Supreme Court, U.S.
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No. 031107

In The

Supreme Court of the United States

CENTER FOR FAIR PUBLIC POLICY, *et al.*,

Petitioners,

vs.

MARICOPA COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), does Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), constitute the holding of the Court in that case?

2. Did the court of appeals err in holding that Justice Kennedy's *Alameda Books* "proportionality" requirement for content-*based* time, place and manner restrictions contained no different elements and was not more speech-protective than the *Alameda* plurality's construction of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)?

3. Did the court of appeals err in alternatively holding that Justice Kennedy, in *Alameda*, intended to create a unique "proportionality" test applicable only to content-based "*place*" restrictions of expression, but inapplicable to content-based "*time*" or "*manner*" restrictions?

4. Did the court of appeals misstate this Court's ruling in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by holding that the "narrow tailoring" requirement for "time, place and manner" restrictions is satisfied merely "so long as the government's asserted interest would be achieved less effectively absent the regulation," without *at least* the additional requirement from *Ward* that "the means chosen are not substantially broader than necessary to achieve the government's interest," thus adopting a new "narrow tailoring" test which is neither "narrow" nor "tailored," and which imposes no effective limits whatsoever on legislative power to restrict the operation of expressive businesses?

LIST OF PARTIES BELOW

(Pursuant to Rule 14.1(b))

Petitioner CENTER FOR FAIR PUBLIC POLICY ("CFFPP") is an Arizona non-profit corporation and an appellant below. DREAM PALACE, a .dba of Liberty Entertainment Group, L.L.C., an Arizona Limited Liability Company, is an additional petitioner herein and appellant below. Neither CFFPP nor Liberty Entertainment Group is owned by any parent company, nor has any non-wholly owned subsidiary company.

Respondent MARICOPA COUNTY, an appellee below, is a political subdivision of the State of Arizona. The following parties below are additional respondents herein:

RICHARD M. ROMLEY (in his official capacity as Maricopa County Attorney),

THE CITY OF PHOENIX, an Arizona municipal corporation,

THE CITY OF GLENDALE, an Arizona municipal corporation, and

THE STATE OF ARIZONA, which appeared below as an Intervenor.

The following entities were parties below and have indicated, through counsel, their intention not to participate in the proceedings before this Court (and, pursuant to Rule 12.6, additional notice of this is provided to the Clerk and all counsel under separate cover): CASTLE SUPER-STORE CORPORATION (a plaintiff and appellant below in Ninth Circuit case no. 00-16858), L.J. CONCEPTS,

LIST OF PARTIES BELOW – Continued

INC., STUMMER, L.L.C., INC., MID-CITY ENTERPRISES, INC., B.C. BOOKS, INC., DANIEL RAY GOLLADAY and MICHAEL J. AHEARN (all of whom were plaintiffs and appellants below in Ninth Circuit case no. 00-16905).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
Introduction	8
A. The court of appeals' decision conflicts dramatically with the proportionality requirement articulated in Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)	9
B. Review is necessary to resolve a significant conflict in the circuit courts of appeals regarding the proper interpretation and application of Justice Kennedy's "proportionality" requirement in *Alameda Books*	13
C. There is also a conflict between the court of appeals' decision below and the decisions of both this Court and other circuit courts with regard to the meaning of the "narrow tailoring" requirement under a test of traditional intermediate scrutiny	18
CONCLUSION	22

TABLE OF CONTENTS – Continued

Page

APPENDICES

Appendix A *Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) ..... App. 1

Appendix B District Court of Arizona Judgment Against Plaintiffs and Dismissal of Complaint (Sept. 13, 2000)..... App. 42

Appendix C District Court of Arizona Order, and Order for Entry of Judgment Against Plaintiffs (Sept. 13, 2000)..... App. 43

Appendix D Stipulation to Submit Remaining Issues to District Court of Arizona (August __, 2000)..... App. 46

Appendix E Ninth Circuit Opinion Affirming Denial of Preliminary Injunction (March 30, 2000)..... App. 49

Appendix F District Court of Arizona Order Denying Preliminary Injunction (September 30, 1999)..... App. 52

Appendix G Ninth Circuit Denial of Rehearing En Banc (Sept. 30, 2003)..... App. 66

Appendix H Arizona Senate Bill 1162 Amending Arizona Revised Statutes..... App. 69

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Trustees of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 21

Center For Fair Public Policy v. Maricopa County,
336 F.3d 1153 (9th Cir. 2003) 1

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) ..... *passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 7, 8, 12

Edenfield v. Fane,
507 U.S. 761 (1993) 21

Encore Videos, Inc. v. City of San Antonio (Encore I),
310 F.3d 812 (5th Cir. 2002) 17

Encore Videos, Inc. v. City of San Antonio (Encore II),
330 F.3d 288 (5th Cir. 2003) 18, 20, 21

Frisby v. Schultz,
487 U.S. 474 (1988) 21

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003) 14, 17

Giovani Carandola, Ltd. v. Bason,
303 F.3d 507 (4th Cir. 2002) 20

Marks v. United States,
430 U.S. 188 (1977) 6, 8, 11

N.W. Enterprises, Inc. v. City of Houston,
352 F.3d 162 (5th Cir. 2003) 15, 16, 17

Peek-A-Boo Lounge v. Manatee County,
337 F.3d 1251 (11th Cir. 2003) 17, 20

TABLE OF AUTHORITIES – Continued

Page

SDJ, Inc. v. City of Houston,
837 F.2d 1268 (5th Cir. 1988) 16

S.O.C., Inc. v. County of Clark,
152 F.3d 1136 (9th Cir. 1998) 21

Time Warner Entertainment Co. v. FCC,
240 F.3d 1126 (D.C. Cir. 2001) 20

Turner Broadcasting System v. F.C.C. (Turner II),
520 U.S. 180 (1997) 19, 22, 23

United States v. American Library Ass'n, Inc.,
___ U.S. ___, 123 S.Ct. 2297 (2003) 20

United States v. Morison,
844 F.2d 1057 (4th Cir. 1988) 20

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 15

Universal City Studios, Inc. v. Corley,
273 F.3d 429 (2nd Cir. 2001) 20

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 8, 9, 22, 23

Weinberg v. City of Chicago,
310 F.3d 1029 (7th Cir. 2002) 20

CONSTITUTIONAL PROVISIONS

United States Constitution:

First Amendment ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 4
28 U.S.C. § 1343(a)(4) 4
28 U.S.C. § 2101(c) 2
42 U.S.C. § 1983 4

STATE STATUTES

A.R.S. § 13-1421 2
A.R.S. § 13-1422 ..... 2, 3
Arizona Senate Bill 1162 2

PETITION FOR A WRIT OF CERTIORARI

Petitioners Center For Fair Public Policy and Dream Palace (hereafter collectively either "CFFPP" or "Petitioners") hereby pray that the Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which, by a 2-1 decision, upheld an Arizona statute significantly restricting the hours of operation of all adult entertainment businesses throughout that state, departing from substantial precedent of this Court including, most recently, its landmark decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), and is reproduced as Appendix A to this Petition. (App. 1.) The order of that court denying rehearing and rehearing en banc is reproduced as Appendix G to this Petition. (App. 66.) The only opinion of the United States District Court for the District of Arizona is its opinion of September 30, 1999 denying petitioners' application for a preliminary injunction, and is unreported. It is reproduced as Appendix F to this Petition. (App. 52.) It was subsequently adopted as the District Court's opinion in support of its final judgment. See Order For Entry of Judgment. (App. 43.)

JURISDICTION

A divided panel of the United States Court of Appeals for the Ninth Circuit entered its opinion in this case on July 28, 2003. That court's decision became final on September 30, 2003, when it denied a petition for rehearing and suggestion for rehearing en banc. Petitioners thereafter obtained a 30-day extension from this Court and have timely filed this petition within the requirements of 28 U.S.C. § 2101(c). This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press;. . . ."

Arizona's Adult Business Hours of Operation statute (A.R.S. § 13-1422) is reproduced in full in Appendix H,[1] but, in pertinent part, provides that adult entertainment businesses:

> "shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday"

[1] A.R.S. § 13-1422 is the *current* section number of the statute here at issue. However, as originally enacted within Arizona Senate Bill 1162, it was numbered as § 13-1421. In a subsequent enactment, it was renumbered to be § 13-1422, with no changes in the text whatsoever. So the Court may review the entirety of the *original* legislation, petitioners have reproduced in Appendix H the entirety of Conference Engrossed Senate Bill 1162. Section 13-1421 appears therein at App. 80.

and further provides that "[a] violation of this section is a class 1 misdemeanor."

STATEMENT OF THE CASE

This case raises First Amendment questions of great practical and doctrinal importance: the significance of this Court's landmark split decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) – and particularly the "proportionality" requirement expressed in Justice Kennedy's concurring opinion – for analyzing content-*based*[2] time, place, or manner restrictions of expression. In upholding a restrictive hours-of-operation regulation under Arizona law, the court of appeals below held 2-1 that *Alameda Books* essentially changes nothing in First Amendment doctrine, even though there is apparently no longer agreement amongst a majority of this Court on the proper analytical framework to apply to content-based time, place and manner restrictions. This petition asks that the Court clarify the import of the "proportionality" requirement of *Alameda Books*, and the role it plays in the proper analysis of content-based time, place, or manner regulations.

Petitioner CFFPP was formed by the owners of 14 adult entertainment businesses throughout Arizona to respond to the enactment of A.R.S. § 13-1422, which

[2] In *Alameda Books*, five Justices agreed that restrictions primarily aimed at adult entertainment businesses are properly considered as content-*based*, rather than content-*neutral*. That terminology, accordingly, will be used throughout this petition.

imposed a statewide hours-of-operation restriction on all such businesses. The new law required their closure between 1:00 a.m. and 8:00 a.m. seven days a week, and until noon on Sundays.

CFFPP and several of its members, including petitioner Dream Palace (a live adult entertainment business), filed this action in federal district court soon after the statute's enactment in 1998. Plaintiffs sought declaratory and injunctive relief against Maricopa County's threatened enforcement of the challenged statute, under 42 U.S.C. § 1983. The district court's jurisdiction was properly invoked under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343(a)(4) (jurisdiction over actions arising under 42 U.S.C. § 1983).

The named defendants were Maricopa County, Richard M. Romley (in his official capacity as Maricopa County Attorney), and the City of Phoenix; the State of Arizona was granted leave to intervene in this action as a defendant. This case was consolidated with a parallel federal action seeking similar relief.[3]

The district court denied the consolidated plaintiffs' motions for preliminary injunction. (Appendix F; App. 52.) Petitioners unsuccessfully sought review of that ruling in the court of appeals. (Appendix E; App. 49.) Following remand, the parties stipulated that the court's order denying the preliminary injunction would be treated as a final judgment, with all parties reserving the right to appeal. (Appendix D; App. 46.) The district court then

[3] L.J. Concepts, *et al. v.* City of Phoenix, *et al.*, D. Ariz. No. CIV 98-1583-PHX.

issued its final judgment dismissing the action. (Appendices B and C; App. 42 and 43, respectively.) All plaintiffs appealed, and the cases were again consolidated in the court of appeals.

Petitioners asserted in the Ninth Circuit, *inter alia*, that the challenged statute was not "narrowly tailored" under the First Amendment, because:

A. "The legislative record does not suggest or even imply that adult businesses cause greater problems during the prohibited hours than at any other times of the day," and

B. "[Where] the burden on expression is substantial . . . , a state must establish a substantial showing of need for any such restrictions."

While this case was pending on appeal, this Court announced its landmark decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Justice Kennedy articulated the narrowest opinion upholding the judgment, stating that laws singling out adult businesses for time, place and manner restrictions are in fact content-based, not content-neutral, and, consequently, must additionally meet a "proportionality" test by which one evaluates the validity of such a restriction by comparing its perceived impact in reducing adverse secondary effects with its adverse impact, if any, on expression: "The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech." 535 U.S. at 450. Likewise, he stated that "[t]he claim, therefore, must be that . . . the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced." 535 U.S. at 451.

A mere "promised *proportional* reduction does not suffice." *Id.*

Given the importance of the *Alameda Books* decision, the parties submitted supplemental briefing to the Ninth Circuit prior to argument. In its subsequent 2-1 decision upholding the challenged statute, the court of appeals split sharply over the perceived impact of Justice Kennedy's concurring opinion in *Alameda Books* on the present appeal. All three judges agreed that Justice Kennedy's opinion was the holding of the case under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), but they disagreed sharply over its proper interpretation and impact on the analysis of time, place and manner cases.

The panel majority concluded that respondents had made a prima facie evidentiary showing of secondary effects of late-night adult businesses, although the panel found it to be "hardly overwhelming." (App. 26.) However, neither court below identified any evidence in the record suggesting that any secondary effects believed to be related to the operation of adult entertainment businesses are disproportionately *greater* during the late night hours or on Sunday mornings than at any other times. Nor did the defendants adduce any evidence suggesting that adult businesses cause, or are likely to cause, greater adverse secondary effects late at night than are caused by many *non*-adult late night businesses. Moreover, plaintiffs had submitted uncontroverted evidence that many customers of adult businesses in Arizona are able to patronize such businesses only during the hours of required closure.

The panel majority concluded that Justice Kennedy's opinion in *Alameda Books* required *upholding* the statute, on two alternative bases, rejecting Judge Canby's conclusion in

his dissent that Justice Kennedy's articulated rationale compelled *invalidation* of this statute.[4] First, the panel majority virtually *conceded* that if Justice Kennedy's language were applied literally to the current statute, the law would have to be found unconstitutional[5], but then opined that Justice Kennedy simply did not intend his "proportionality analysis" to extend beyond the specific type of ordinance at issue in *Alameda Books*, i.e., a content-based adult zoning (or "place") restriction.[6] (App. 16, 18.) Because the current case involves a content-based "time" restriction – and not a "place" restriction, the majority concluded that Justice Kennedy's opinion was inapplicable.

Alternatively, and in seeming contradiction, the majority asserted that notwithstanding Justice Kennedy's extensive discussion of a constitutional requirement of "proportionality" for analyzing content-based zoning restrictions, he did not intend to establish a different constitutional test than the one Justice O'Connor articulated in interpreting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for the four-Justice plurality in *Alameda Books*. (App. 15, 17-18.) The panel majority therefore concluded that the challenged statute must be upheld

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[4] *See* App. 34-41.

[5] *See* App. 16, where the majority stated that "the application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate *all* such laws." (Petitioners dispute that a proper application of Justice Kennedy's test would lead to any such widespread dire consequences. In their view, only those statutes which are the "least proportional" would fall.)

[6] "[Justice Kennedy's] proportionality requirement was simply not designed with this particular type of restriction in mind." App. 16.

because the "traditional *Renton* framework"[7] does not require "proportionality" between a statute's impact on expression and the extent to which it actually reduces secondary effects, nor is a reviewing court required to examine "how speech will fare" (another element Justice Kennedy found to be indispensable, 535 U.S. at 450). *Id.*

Finally, analyzing the statute as if it were a truly content-*neutral* time, place and manner restriction (such as the one at issue in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)), the court created a truncated and therefore diluted "narrow tailoring" test which requires upholding such a law on the mere showing that "the government's asserted interest 'would be achieved less effectively absent the regulation'" (App. 29), without including *Ward's* further requirement that such a law may not be "substantially broader than necessary to achieve the government's interest." 491 U.S. at 800.

REASONS FOR GRANTING THE WRIT

Introduction

Review by this Court is warranted herein for at least three distinct reasons: (1) the court of appeals' decision conflicts with the proportionality requirement articulated in Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which, under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), is presumed to constitute the holding in

[7] App. 18.

Alameda; (2) there is in any event a significant conflict in the circuit courts of appeals regarding the proper interpretation and application of Justice Kennedy's proportionality requirement articulated in *Alameda Books*; and (3) the court of appeals' opinion also conflicts with this Court's decisions articulating the "narrow tailoring" standard even as it has been used by this Court in cases involving truly content-*neutral* time, place and manner restrictions such as *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

A. The court of appeals' decision conflicts dramatically with the proportionality requirement articulated in Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), this Court analyzed the constitutionality of a "secondary-effects-justified" adult zoning restriction. Because there was no majority opinion, the judgment was formed by Justice O'Connor and the three justices who concurred in her plurality opinion, along with Justice Kennedy, who filed a separate concurring opinion. Justice Kennedy declined to join in the plurality opinion because he thought it might "constitute a subtle expansion [of *Renton*], with which [he did] not concur." 535 U.S. at 445.

While Justice Kennedy agreed with most of the plurality's formulation of the applicable test, he apparently wrote separately to articulate that where, as in *Alameda*, a time, place or manner restriction is content-based on its face, there is an additional element which government must prove in order to establish its constitutionality. Specifically, because the particular dangers inherent in content-*based* time, place and manner restrictions are not equally present in

content-*neutral* time, place and manner restrictions, Justice Kennedy stated that:

> "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice Souter. . . . The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-450.

The primary flaw which Justice Kennedy saw in the plurality's opinion is that its "analysis does not address how speech will fare under the city's ordinance." He then further explained that "[i]t is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." *Id.* at 450. He further observed that "[i]t is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, *a promised proportional reduction does not suffice*." *Id.* at 451. (Emphasis added.)

He concluded his analysis of this point by succinctly stating what government must establish to justify the type of content-based restriction before the Court in *Alameda*:

> "The claim, therefore, must be . . . that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced." *Id.*

The court of appeals herein candidly acknowledged that if Justice Kennedy's proportionality requirement applied to *all* content-based time, place and manner

restrictions of adult businesses, it would require striking the Arizona hours of operation statute before it.[8] The apparent reason for the court's frank acknowledgement was that the statute could not survive under a "proportionality" test because there was no evidence below that there were more secondary effects during any of the hours when adult businesses were required to close than during the hours of permitted operation. Consequently, the evidence could demonstrate only that the statute reduces secondary effects in direct proportion to its restriction of access to expression, a clear violation of Justice Kennedy's articulated test.

Although acknowledging that Justice Kennedy's concurrence constituted the holding in *Alameda* under the rule of *Marks*,[9] the court of appeals concluded that Justice Kennedy intended to limit his proportionality requirement only to content-based *zoning* restrictions of adult businesses and that his ruling would *not* apply equally to any *other* types of content-*based* restrictions on adult businesses assertedly justified by a secondary effects rationale (e.g., a "*time*" restriction). (App. 16.) In so ruling, the court of appeals clearly failed to follow the guidelines articulated by Justice Kennedy in *Alameda*.

It is inconceivable that Justice Kennedy or any other member of this Court intended to create different tests, e.g., to have one method of constitutional analysis for content-based *place* restrictions on adult expression but a different and less searching method of analysis for content-based restrictions on the *time* or *manner* of expression.

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[8] *See* n. 5, *supra*.

[9] App. 11-12.

Historically, this Court has never distinguished between the tests applicable to restrictions on the "time," "place" or "manner" of expression. Nothing in Justice Kennedy's opinion suggests departing from such a clear and unbroken line of precedent.

Finally, the court of appeals alternatively (and seemingly contradictorily) reasoned that it should not apply the proportionality requirement because Justice Kennedy did not intend to enunciate a test which differed substantively from the *Renton* test as formulated by the *Alameda* plurality. (App. 15.) That approach, however, would render meaningless the many pages which Justice Kennedy devoted to distinguishing his view of the required elements of the applicable test, from the different test articulated in the plurality opinion. In short, the court of appeals' attempt to distinguish Justice Kennedy's concurrence by asserting that it is no different from the plurality's holding in *Alameda* is flatly contradicted by Justice Kennedy's concurring opinion itself. Indeed, there would have been no need to *write* a concurring opinion in *Alameda* had Justice Kennedy agreed with the substance of the plurality's expressed view of the applicable test under *Renton*.

For all these reasons, a writ of certiorari should be granted so this Court may either issue a majority opinion articulating a unitary test for content-based time, place and manner restrictions or, alternatively, otherwise clarify the significance and proper use of the "proportionality requirement" set forth in Justice Kennedy's concurring opinion in *Alameda Books*.

B. Review is necessary to resolve a significant conflict in the circuit courts of appeals regarding the proper interpretation and application of Justice Kennedy's "proportionality" requirement in *Alameda Books*.

There is a pressing need for this Court to clarify the significance of Justice Kennedy's "proportionality" requirement in *Alameda Books* because the circuit courts of appeals are badly split in interpreting and applying that requirement.

For example, the Ninth Circuit, in the case at bar, concluded that Justice Kennedy's concurring opinion in *Alameda does* constitute the holding in *Alameda* (App. 11-12), but concluded that his proportionality requirement applied only to content-based restrictions on the *place* where expressive businesses could locate, but not to content-based restrictions on the *time* or *manner* of expression. *See* App. 16 where the court states:

> "Justice Kennedy's proportionality analysis . . . needs to be understood in light of the particular species of secondary effects law that the Court was considering. The ordinance at issue in *Alameda Books* was a classic erogenous zoning ordinance whereby the city was restricting certain land uses. It was a 'place' restriction, and Justice Kennedy's proportionality analysis is easy enough to understand and to apply to such a typical zoning ordinance. The city's rationale cannot be that when it requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech."

Concluding that the proportionality requirement was intended to apply only to content-based *place* restrictions,

the court of appeals held that this "proportionality analysis" would *not* apply to a content-based "time" restriction. (App. 16, 18.) In short, the court of appeals held that Justice Kennedy established one type of constitutional test for content-based "place" restrictions, and a different constitutional test for content-based "time" or "manner" restrictions.

In sharp contrast, the Seventh Circuit recently revealed a conflicting view, implicitly concluding that Justice Kennedy's proportionality requirement applies to *all* content-based "time, place *or* manner" restrictions, and applying that test to a "manner" restriction. Specifically, in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003), the court acknowledged the controlling nature of Justice Kennedy's proportionality requirement (350 F.3d at 637) and reiterated that under that test, " 'the rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.' " 350 F.3d at 638, quoting from 535 U.S. at 450. Fairly stated, had the Arizona hours of operation statute at issue herein been before the Seventh Circuit panel which decided *G.M. Enterprises*, the court would clearly have invalidated the "hours" statute because there was no evidence that it reduced secondary effects other than in direct proportion to the number of hours of operation it was restricting. There was no evidence that there were any disproportionately *greater* amounts or types of adverse secondary effects occurring during the hours of forced closure.

The Seventh Circuit in *G.M. Enterprises*, likewise relied on Justice Kennedy's concurrence for its conclusion that a municipality must demonstrate "how speech will fare under the city's ordinance." 350 F.3d at 638. No such analysis was employed by the Ninth Circuit herein; and as

the Ninth Circuit itself made clear, applying the proportionality requirement to the "hours of operation" statute would have compelled invalidating it.[10] (App. 16.)

The opinion herein also conflicts with the recent decision of the Fifth Circuit Court of Appeals in *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir.

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[10] The Seventh Circuit applied Justice Kennedy's test to the challenged ordinance (which imposed separation requirements between nude dancers and customers in places where alcohol was served). Although concluding that the ordinance met the required elements of Justice Kennedy's new test, the court found that the test applied to the "manner" restriction before it (expressly noting that the ordinances before the Court "regulate the *manner* in which patrons view nude dancing, *id.* at 638) and made the following specific finding:

> "Thus, as the ordinances will leave the availability of nude dance entertainment substantially the same, . . . [they meet] Justice Kennedy's test of 'how speech will fare under the city's ordinance[s],' *Alameda Books*, 535 U.S. at 450."

The same cannot be said of Arizona's hours of operation statute, which will dramatically reduce the number of hours that adult businesses may be open, and accomplishes nothing other than the reduction of secondary effects by the direct reduction of the amount of time the public has access to expression.

Compare also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 812 (2000), striking an hours of operation restriction on cable television programmers and observing:

> "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and the laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."

While *Playboy* was found to be a *direct* content-based restriction, rather than a content-based time, place and manner restriction (and therefore was subjected to the most strict level of judicial scrutiny), nonetheless, this Court acknowledged the speech-destructive impact of a law imposing significant restrictions on the hours during which the public may have access to constitutionally protected expression.

2003). In that case, litigated by undersigned counsel, the court reviewed, *inter alia*, the constitutionality of Houston's second major revision of its adult business locational restrictions. Houston's earlier adult locational restrictions were upheld in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), and forced the closure of *at least* the 23 adult business plaintiffs which were lawfully operating prior to the ordinance change. *See* 352 F.3d at 1271.

Houston's most recent amendment to its adult business locational restrictions changed the rules once again, by dramatically increasing the mandatory separations between adult businesses and specified sensitive uses and requiring the closure of over 100 adult businesses which were operating in compliance with the zoning restrictions upheld in *SDJ*. Houston enacted its amended ordinance without any evidence that secondary effects attributable to the adult businesses were occurring further away from the adult businesses than the original required separation distances. 352 F.3d at 174. In short, there was no evidence that the new ordinance would likely reduce secondary effects to any significant extent, although its effect on existing expression would obviously be devastating. Undersigned counsel argued to the Fifth Circuit that under Justice Kennedy's proportionality analysis, such an ordinance is clearly unconstitutional. The Fifth Circuit, unlike the Ninth Circuit, failed even to *acknowledge* Justice Kennedy's proportionality analysis in *Alameda* and, instead, construed his opinion as being constitutionally indistinguishable from that of the plurality.[11] This

[11] *See, e.g.*, 352 F.3d at 174, where the court states:

"The standard of constitutional scrutiny, after *Alameda Books, and taking into account Justice Kennedy's concurrence,*

(Continued on following page)

approach is in sharp contrast to that of *both* the Ninth Circuit in the present case and the Seventh Circuit in *G.M. Enterprises*.[12]

Indeed, the Fifth Circuit's opinion in *N.W. Enterprises* represented its *second* consideration of the significance of Justice Kennedy's concurrence. In *Encore Videos, Inc. v. City of San Antonio (Encore I)*, 310 F.3d 812 (5th Cir. 2002), the court struck down a San Antonio adult zoning ordinance based on yet a fourth interpretation and application of Justice Kennedy's concurring opinion in *Alameda*. The Fifth Circuit specifically discussed and analyzed the San Antonio ordinance under Justice Kennedy's concurring opinion and concluded that Justice Kennedy's vote, combined with the votes of the four dissenters in *Alameda*, constituted a holding based on one

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> is simply whether Ordinance 97-75 addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the City. Even before *Alameda Books*, however, neither the Supreme Court nor this court required proof of the efficacy of an ordinance in order to determine the constitutional review standard." (Emphasis added.)

It is hard to understand how one can read Justice Kennedy's *Alameda* concurrence and not conclude that for challenged legislation to be upheld, there must be some proof of its efficacy. How else can courts compare the asserted benefit to be derived from a law to the burden on expression which it imposes?

[12] This approach is also in conflict with an observation from the Eleventh Circuit in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003) where the court noted that, under the concurring opinion of Justice Kennedy in *Alameda*, "the County 'must advance some basis to show that its regulation has the . . . effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.'" 337 F.3d at 1267, n. 15, quoting from Justice Kennedy's concurrence in *Alameda Books*, 122 S.Ct. at 1742.

of the aspects of the *Alameda* opinion articulated in Justice Souter's *dissenting* opinion. However, on reconsideration, the court issued an amended opinion, *Encore Videos, Inc. v. City of San Antonio (Encore II)*, 330 F.3d 288 (5th Cir. 2003), in which it struck the ordinance under a traditional "narrow tailoring" test, deleting any mention of Justice Kennedy's concurring opinion or its significance, if any, in the analysis of this type of ordinance.

Based on the foregoing, it is clear that the courts of appeal urgently require guidance from this Court concerning: (1) whether Justice Kennedy's opinion is the holding of this Court in *Alameda Books*; (2) whether that opinion establishes a constitutional test of broader dimension, which is more speech-protective, than that of the plurality in *Alameda*; and (3) whether this proportionality requirement applies equally to all content-based time, place and manner restrictions, or only to "place" restrictions.

C. There is also a conflict between the court of appeals' decision below and the decisions of both this Court and other circuit courts with regard to the meaning of the "narrow tailoring" requirement under a test of traditional intermediate scrutiny.

Wholly apart from its refusal to apply Justice Kennedy's new "proportionality test," the court below erred in reformulating the "narrow tailoring" requirement for time, place and manner restrictions in a critical manner severely at odds with prior decisions of both this Court and other courts of appeals. Specifically, the panel majority opinion articulates a new minimalist "narrow tailoring" test which is neither "narrow" nor in any sense "tailored":

> "The narrow tailoring requirement is satisfied so long as the government's asserted interest 'would be achieved less effectively absent the regulation.'" App. 29. [Quoting from this court's prior decision in *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Under this insupportably loose and novel articulation of "narrow tailoring," a law which imposed a twenty mile separation requirement between adult businesses and residential districts would be "narrowly tailored" because the asserted governmental interest "would be achieved less effectively absent the regulation." The court of appeals erred in failing to include *the entirety* of the narrow tailoring test articulated in *Ward*. Specifically, *Ward* tempered the open ended language selectively quoted by the court of appeals with the admonition that "the means chosen [may not be] substantially broader than necessary to achieve the government's interest." 491 U.S. at 800. This is consistent with this Court's reiteration of the "traditional" narrow tailoring test (i.e., the one which indisputedly applies to truly content-*neutral* restrictions of expression) in *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 185 (1997), where this Court held that a law is "narrowly tailored" under intermediate scrutiny, if it does "not burden substantially more speech than necessary to further [important] governmental interests."

By omitting the language quoted above, the court of appeals established a new and startlingly speech-insensitive test for "narrow tailoring" which eliminates *all* suggestion that such restrictions must be "narrow," "tailored," or in any way "efficacious."

Additionally, the abandonment of any meaningful narrow tailoring requirement by the court of appeals is

also inconsistent with the recent trend in this Court's intermediate scrutiny cases to strive for a "reasonable fit" between the scope of a regulation and the purposes to be served by that regulation. *See, e.g.*, Justice Breyer's concurrence in *United States v. American Library Ass'n, Inc.*, ___ U.S. ___, 123 S.Ct. 2297, 2311 (2003), observing that the recent trend in intermediate scrutiny tests is to inquire "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives?" This approach seems remarkably similar to that taken by Justice Kennedy in *Alameda Books*, albeit arguably utilizing a slightly different analytical structure for arriving at the same result.

Furthermore, the Ninth Circuit's dangerous new definition of "narrow tailoring" is also entirely inconsistent with the use of that term by other circuit courts of appeal.[13] *See, e.g.*, the most recent example of this found in

[13] The court of appeals' interpretation of intermediate scrutiny's "narrow tailoring" requirement squarely conflicts with the "narrow tailoring" approaches taken in, *e.g.*, *Weinberg v. City of Chicago*, 310 F.3d 1029, 1040 (7th Cir. 2002) ("while a regulation does not have to be a perfect fit for the government's needs, it cannot substantially burden more speech than necessary"); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454 (2nd Cir. 2001) (an "incidental restriction on speech must not burden substantially more speech than is necessary to further [a substantial governmental] interest"); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (same); *Encore Videos, Inc. v. City of San Antonio* (*Encore II*), 330 F.3d 288 (5th Cir. 2003) (discussed *infra*); *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251, 1267, n. 15, 1274, n. 23 (11th Cir. 2003) (quoting Justice Kennedy in *Alameda* for proposition that a regulation must "leave[ ] the quantity and accessibility of speech substantially intact"); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 517 (4th Cir. 2002) (noting need for "narrower regulations" which regulate by "a method less invasive of free speech interests"); *United States v. Morison*, 844 F.2d 1057, 1075

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Encore Videos (Encore II), *supra*, n.13. In that case, the Fifth Circuit Court of Appeals struck down an adult zoning restriction as applied to a "take home only" video store, less than half of whose inventory consisted of adult videos, and which had no on-premises viewing of any videos. The court found that such businesses have never been shown to have the type of secondary effects often attributed to adult entertainment businesses. The Fifth Circuit held that "[t]he ordinance's constitutionality under the time, place, and manner test . . . turns on the narrow tailoring prong" (330 F.3d at 293), and that for a city to meet "the narrow tailoring standard", such an ordinance must "target . . . and eliminate . . . no more than the exact source of the evil it seeks to remedy," *id.*, quoting, in turn from *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Expounding further, *Encore II* stated:

> "Although government need not choose the 'least intrusive means' to advance its legitimate interests, it 'may not regulate expression in such a manner that a substantial portion of the burden on speech *does not serve to advance its goals.*'" 330 F.3d at 293 (emphasis added), quoting from *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Furthermore, given that this Court has increasingly recognized that at least *some* of the types of laws subject to intermediate scrutiny should be reviewed under a "narrow tailoring" standard which requires proof of both efficacy and "reasonable fit,"[14] and that even those intermediate

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(4th Cir. 1988) (*accord*); and *compare S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998).

[14] *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (first articulating the "reasonable fit" standard of narrow tailoring); and *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993)

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scrutiny cases applying the more traditional narrow tailoring standard of *Ward* and *Turner Broadcasting* (utilized for truly content-*neutral* restrictions) have never suggested any *weakening* of that test, the Ninth Circuit's new "watered-down" formulation of "narrow tailoring," will *significantly* dilute First Amendment protections unless corrected by this Court.

CONCLUSION

For all the reasons above, this Court is urged to grant review to resolve the critical questions of: (1) whether Justice Kennedy's opinion is the holding of this Court in *Alameda Books*; (2) whether that opinion establishes a broader constitutional test which is more speech-protective than that of the *Alameda* plurality; (3) whether the *Alameda* proportionality requirement applies equally to all content-based time, place and manner restrictions, or only to "place" restrictions; and (4) *Alameda* aside, whether the court of appeals has impermissibly established a new standard of "narrow tailoring" that is significantly

(clarifying that under the "reasonable fit" test of narrow tailoring, proof of efficacy is required i.e., that government must prove "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

weaker than the one utilized by this Court in *Ward v. Rock Against Racism* and *Turner Broadcasting*?

Respectfully submitted,

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APPENDIX A

336 F.3d 1153

CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; Dream Palace, a dba of Liberty Entertainment Group, L.L.C., an Arizona Limited Liability Company; Castle Superstore Corporation, an Arizona corporation, Plaintiffs-Appellants,

and

L.J. Concepts, Inc., Plaintiff,

v.

MARICOPA COUNTY, ARIZONA; Richard M. Romley, in his official capacity as Maricopa County Attorney; City of Phoenix, a municipal corporation, Defendants-Appellees, State of Arizona, Intervenor-Appellee,

and

City of Glendale, Defendant.

LJ Concepts, Inc., an Arizona corporation; Stummer LLC, Inc., an Arizona corporation; Mid-City Enterprises, Inc., an Arizona corporation; B.C. Books, Inc., a Delaware corporation; Michael J. Ahearn, Plaintiffs-Appellants, State of Arizona, Intervenor-Appellee,

and

Center for Fair Public Policy, an Arizona non-profit corporation; Dream Palace, an Arizona Limited Liability Company dba Liberty Entertainment Group, L.L.C.; Castle Superstore Corporation, an Arizona corporation; Daniel Ray Golladay, Plaintiffs,

v.

City of Phoenix, a municipal corporation; Maricopa County, Arizona; Richard Romley, in his official capacity as Maricopa County Attorney; City of Phoenix, a municipal corporation; City of Glendale, an Arizona municipal corporation, Defendants-Appellees.

Nos. 00-16858, 00-16905.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 11, 2003.

Filed July 28, 2003.

G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, CA, argued the cause and filed briefs for appellant Center for Fair Public Policy, et al. John H. Weston was on the briefs.

Richard J. Hertzberg, Phoenix, AZ, argued the cause and filed briefs for appellants L.J. Concepts, et al.

Scott E. Boehm, Copple, Chamberlin, Boehm & Murphy, P.C., Phoenix, AZ, argued the cause and filed briefs for the defendants. Janet A. Napolitano, Arizona Attorney General, and Thomas J. Dennis, Assistant Arizona Attorney General, Phoenix, AZ, were on the briefs. James H. Hays, Assistant City Attorney for the City of Phoenix, and James M. Flenner, Assistant City Attorney for the City of Glendale, were also on the briefs.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. Nos. CV-98-01583-EHC, CV-98-01584-EHC.

Before CANBY, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge CANBY.

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide whether a state statute prohibiting sexually-oriented businesses from operating during late night hours passes muster under the First Amendment.

I

The Arizona statute at issue here requires all sexually-oriented businesses[1] to close "between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday." Ariz.Rev.Stat. § 13-1422(A). A sexually-oriented business is an "adult arcade, adult bookstore or video store, adult cabaret, adult motion picture theater, adult theater, escort agency or nude model studio . . . ." *Id.* Violation of § 13-1422(A) is a class one misdemeanor. *Id.* § 13-1422(B).

Section 13-1422 was originally proposed to the Arizona legislature in 1998 as Senate Bill 1367. The bill was assigned to the House of Representatives' Government Reform and States' Rights Committee and to the Senate Family Services Committee, and public hearings were held in both bodies. While the original bill passed in the

[1] We adopt the nomenclature used in the statute for the sake of convenience.

Senate, it was voted down in the Arizona House Rules Committee.

At the same time, Senate Bill 1162, a bill authorizing Arizona counties to develop land-use regulations within their respective jurisdictions, and which included an authorization to license and to regulate sexually-oriented businesses operating within unincorporated areas, was winding its way through the legislature. When original Senate Bill 1367 failed in the House Rules Committee, its provisions were added verbatim as an amendment to the more comprehensive Senate Bill 1162. Amended Senate Bill 1162 passed both the House and the Senate, and was signed into law on June 1, 1998, and became effective on August 21, 1998.

The record before the Arizona legislature prior to § 13-1422's enactment consisted of testimonial evidence from several individuals, as well as some limited documentary evidence with respect to the need for restricting sexually-oriented businesses' hours of operation.

Russell Smolden and Jane Lewis both testified before House and Senate committees. These individuals worked for mixed-use real estate parks located in Tempe and Phoenix, and both testified that nearby sexually-oriented businesses were disruptive of their attempts to attract new employers to the parks, and prospective employers expressed concern for their employees who worked night-shifts. They testified that limiting the hours of operation of the nearby sexually-oriented businesses would aid in their efforts to attract employers to the parks.

Scott Bergthold, the executive director and general counsel to the National Family Legal Foundation

("NFLF"), testified that similar hours of operation restrictions had been upheld as constitutional by federal courts. He also testified that approximately fifteen studies had been conducted concerning the negative secondary effects associated with sexually-oriented businesses. Those studies documented increased crime, prostitution, public sexual indecency and health risks associated with HIV and AIDS transmission.

Donna Neil, co-founder of a group known as the Neighborhood Activist Interlinked Empowerment Movement ("Nail'em"), testified that, each weekend, parents in her neighborhood cleared up litter emanating from neighborhood sexually-oriented businesses. She also testified that the local school's playground was fenced and closed to neighborhood children on weekends due to incidents of prostitution on school grounds. She stated that the neighborhood had experienced an increase in crime – specifically drug arrests and assaults – associated with sexually-oriented businesses. Finally, Bridget Mannock, a neighborhood legislative liaison for the City of Phoenix testified that a state-level hours of operation regulation was necessary due to the limited nature of the local municipalities' authority.

Some documentary evidence was presented to the Arizona legislature. First, there is a letter from the NFLF addressed to the House Government Reform and States' Rights Committee. The letter discussed the acute problems associated with sexually-oriented businesses as documented in a report from the Denver Metropolitan Police Department, which concluded that sexually-oriented businesses "disproportionately deplete police time and resources during the overnight hours." The Denver report itself was not presented to the Committee. The

letter also discussed the fact that the proposed regulation was constitutional because it was a reasonable time, place and manner restriction on speech. Second, there is a letter from the NFLF to House members, discussing ostensibly the same themes raised in the letter to the House Committee. Finally, there is a "fact sheet" prepared by the NFLF, which noted that every study conducted established the negative secondary effects associated with sexually-oriented businesses. In particular, the fact sheet noted a 1989 report prepared by the Minnesota Attorney General's office which concluded that surrounding communities are negatively impacted by 24-hour-a-day or late night operation of sexually-oriented businesses. None of the reports discussed in the fact sheet were presented to the legislature. The fact sheet also contained a discussion of the constitutionality of the proposed restrictions.

The plaintiffs in this action are owners and operators of sexually-oriented businesses in Arizona. They include nude-dancer clubs, x-rated video arcades and sellers of sexually-related magazines and paraphernalia. Some of these businesses were open 24-hours a day prior to enactment of § 13-1422. Two separate groups of plaintiffs – the L.J. Concepts, Inc. plaintiffs and the Center for Fair Public Policy plaintiffs (collectively "Fair Public Policy") – filed suit on September 1, 1998 in federal district court, alleging that § 13-1422 violates the First Amendment, and seeking declaratory and injunctive relief. The cases were consolidated and assigned to Judge Carroll, and a briefing schedule with respect to the propriety of issuing a preliminary injunction was agreed upon.

While the parties were briefing the preliminary injunction issue, the state defendants placed in the district court record copies of fourteen studies on the negative

secondary effects associated with adult-oriented businesses. Fair Public Policy objected because these studies were not before the legislature prior to § 13-1422's enactment.

On September 30, 1999, Judge Carroll denied Fair Public Policy's application for a preliminary injunction. The district court found that the statute was constitutional under the Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and that there was sufficient pre-enactment evidence, without regard to the studies introduced during the litigation, to support the statute's enactment. The plaintiff groups filed notices of appeal from Judge Carroll's decision, and those appeals were duly consolidated by this court. We affirmed the district court's decision not to issue a preliminary injunction. *See L.J. Concepts v. City of Phoenix,* No. 99-17270, 2000 U.S.App. LEXIS 5906, at *3 (9th Cir. March 30, 2000). On September 13, 1999, the district court denied the plaintiffs' request for a permanent injunction and declaratory relief, and entered judgment for the defendants. Plaintiffs timely appealed.

II

While the constitutionality of hours of operation restrictions on sexually-oriented businesses is an issue of first impression in this circuit, six other circuits have had occasion to consider similar restrictions, and all have found such restrictions to be constitutional under the "secondary effects" test first enunciated by the Supreme Court in *Renton. See DiMa Corp. v. Town of Hallie,* 185 F.3d 823 (7th Cir.1999); *Lady J. Lingerie, Inc. v. City of*

Jacksonville, 176 F.3d 1358 (11th Cir.1999); *Richland Bookmart Inc. v. Nichols,* 137 F.3d 435 (6th Cir.1998); *Nat'l Amusements Inc. v. Town of Dedham,* 43 F.3d 731 (1st Cir.1995); *Mitchell v. Comm'n on Adult Enter. Est. of the State of Delaware,* 10 F.3d 123 (3d Cir.1993); *Star Satellite, Inc. v. City of Biloxi,* 779 F.2d 1074 (5th Cir. 1986).

In *Renton,* the Supreme Court considered a constitutional challenge to a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone. 475 U.S. at 43, 106 S.Ct. 925. Citing its decision in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court established a now familiar three-part analytical framework for evaluating the constitutionality of sexually-oriented business regulations, or what Professor Tribe has described rather aptly as "erogenous zoning laws." Laurence H. Tribe, American Constitutional Law 934 (2d ed.1988). First, the Court asked whether the ordinance was a complete ban on adult theaters. *Id.* at 46, 106 S.Ct. 925. Because the ordinance was not a total ban, it was properly analyzed as a time, place and manner regulation. *Id.* Second, the Court considered whether the ordinance was content neutral or content based. The Court held that, because the ordinance at issue was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects such theaters have on the surrounding community, it was properly classified as content neutral. *Id.* at 47, 106 S.Ct. 925. Third, given this finding, the final step is to ask whether the ordinance is designed to serve a substantial government interest and that reasonable alternative avenues of communication remain available. *Id.* at 50, 106 S.Ct. 925. With respect to the

burden of proof at this stage, the Court held that the First Amendment "does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52, 106 S.Ct. 925.

A

The Supreme Court recently reaffirmed the *Renton* framework in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). At issue in that case was a Los Angeles ordinance prohibiting multiple adult entertainment businesses from operating in the same building. In enacting this ordinance, the city primarily relied on a 1977 study conducted by the city's planning department, which indicated that between 1965 and 1975, crime had grown at a much higher rate in Hollywood, which had the largest concentration of adult establishments in the city, than in the city as a whole. *Id.* at 435, 122 S.Ct. 1728 (plurality opinion). Under the third prong of the *Renton* analysis, we had found that the 1977 study did not reasonably support the inference that a concentration of adult operations in the same building produced higher crime rates. *See Alameda Books, Inc. v. City of Los Angeles,* 222 F.3d 719, 725 (9th Cir.2000). This was so, we held, because the study focused on the effect of a concentration of establishments on a given *area,* not on the effect of a concentration of establishments within a single building. *Id.* It was therefore unreasonable, we opined, for the city to infer that absent its regulation, a combination of establishments within a single building

would have harmful secondary effects on the surrounding community. *Id.*

The Supreme Court reversed. Writing for a four-judge plurality, Justice O'Connor wrote that we had erred in requiring the city to "prove that its theory about a concentration of adult operations . . . is a *necessary consequence* of the 1977 study." 535 U.S. at 437, 122 S.Ct. 1728 (emphasis added). Justice O'Connor explained,

> In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance.

Id. at 438-39, 122 S.Ct. 1728 (internal citation and quotation omitted).

The plurality made two other points of clarification with respect to the evidentiary burden under *Renton.*

First, it rejected the notion that the state is required to come forward with empirical data in support of its ordinance. "Such a requirement," wrote Justice O'Connor, "would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech." *Id.* at 439, 122 S.Ct. 1728.

Second, the plurality made it clear that "the inquiry into whether a [sexually-oriented business regulation] is content neutral" and the "inquiry into whether it is designed to serve a substantial government interest" are separate and distinct. *Id.* at 440, 122 S.Ct. 1728 (quotation and internal citation omitted). Justice O'Connor explained,

> The former requires courts to verify that the "predominate concerns" motivating the ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects.

Id. at 440-41, 122 S.Ct. 1728 (quoting *Renton,* 475 U.S. at 47, 106 S.Ct. 925) (alterations in original).

1

Writing separately, Justice Kennedy concurred in the judgment. Because his concurrence is the narrowest opinion joining in the judgment of the Court, Justice Kennedy's concurrence may be regarded as the controlling

opinion. *See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.") (citation and internal quotation omitted).

In his separate concurrence, Justice Kennedy agreed with the plurality that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Justice Kennedy wrote separately, he explained, for two distinct reasons.

First, he agreed with the four dissenting justices that sexually-oriented business regulations should no longer be designated as "content neutral" when they were clearly not. Whether a statute is content based or content neutral, he explained, "is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Classifying regulations of the type at issue in *Renton* and *Alameda Books* as content neutral, explained Justice Kennedy, was an unhelpful legal fiction which only leads to doctrinal incoherence; these types of ordinances "are content based and we should call them so." *Id.*

Second, while Justice Kennedy agreed with the plurality that *Renton* remained sound, he wrote separately because in his view, the plurality's application of *Renton* "might constitute a subtle expansion" of *Renton*'s principles with which he did not agree. *Id.* at 445, 122 S.Ct. 1728. He explained that, in his view, the question

presented – whether or not the city could rely on judicially approved statutory precedent from other jurisdictions in support of the regulation – "is actually two questions." 535 U.S. at 449, 122 S.Ct. 1728.

> First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

Id. With regard to the first question – the proposition that the city needs to advance – Justice Kennedy wrote that "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* The analysis has to address "how speech will fare under the . . . ordinance." *Id.* at 450, 122 S.Ct. 1728. Because of this, "it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects." *Id.* The rationale, therefore, has to be that a proposed secondary-effects ordinance will leave "the quantity of speech . . . substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* at 451, 122 S.Ct. 1728. To illustrate this proportionality requirement, Justice Kennedy took the facts of the case under consideration,

> If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But . . . a promised proportional reduction does not suffice . . . . The

> premise . . . must be that businesses . . . will for the most part disperse rather than shut down.

Id. at 451, 122 S.Ct. 1728.

Only *after* identifying "the proposition to be proved" can a court seek to answer "the second part of the question presented; is there sufficient evidence to support the proposition?" *Id.* As to the state's evidentiary burden, Justice Kennedy agreed fully with the plurality that "very little evidence is required." *Id.* The "reasonable reliance" standard is necessary, he wrote, because "[a]s a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.*

2

Going straight for the jugular, Fair Public Policy pounces on Justice Kennedy's concurrence in *Alameda Books* and argues that there is no way to reconcile the statute at issue here with his "proportionality" requirement. It argues that sexually-oriented businesses draw a fair amount of their patronage in the evening and late night hours – nude dancing establishments are hardly doing a roaring trade after dawn. The ordinance shuts these establishments down during the late night hours, and therefore it cannot be, as Justice Kennedy would require, that "the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* This is precisely the scenario Justice Kennedy warned against, Fair Public Policy argues, because it is *only* by reducing the enjoyment of protected expression that the state reduces secondary effects. Because the statute cannot be squared with

Justice Kennedy's proportionality analysis, and because his is the controlling opinion under *Marks,* it urges that the statute must be invalid under the First Amendment.

a

Fair Public Policy's argument is a forceful one, but there are several reasons that lead us to conclude that Justice Kennedy never intended a heightened proportionality requirement to apply in this particular context. First and foremost, the argument that Justice Kennedy meant to invalidate an hours of operation restriction of the type at issue here cannot be squared with his insistence that "the central holding of *Renton* remains sound." *Id.* at 448, 122 S.Ct. 1728. Limiting the negative externalities associated with certain land uses, as a properly crafted secondary effects ordinance is designed to do, is a "prima facie legitimate purpose," and for this reason "such laws do not automatically raise the specter of impermissible content discrimination." *Id.* at 449, 122 S.Ct. 1728. Justice Kennedy quite clearly agreed with the plurality that laws "designed to decrease secondary effects . . . should be subject to intermediate rather than strict scrutiny." *Id.* at 449, 122 S.Ct. 1728. He wrote separately to guard against "a subtle expansion" of *Renton,* and *not,* as Fair Public Policy would have it, to signal a fundamental shift in the *Renton* 10229 framework. Given his emphatic reaffirmance of *Renton,* we are not persuaded that Justice Kennedy meant to precipitate a sea change in this particular corner of First Amendment law. This is especially so given that the circuit courts have thus far been unanimous in upholding similar or even more severe hours of operation restrictions under *Renton. See DiMa Corp.,* 185 F.3d 823; *Lady J. Lingerie, Inc.,* 176 F.3d at 1358; *Richland*

Bookmart Inc., 137 F.3d at 435; *Nat'l Amusements Inc.*, 43 F.3d at 731; *Mitchell*, 10 F.3d at 123; *Star Satellite, Inc.*, 779 F.2d at 1074. We read nothing in Justice Kennedy's separate opinion signaling disapproval with these results.

b

Justice Kennedy's proportionality analysis also needs to be understood in light of the particular species of secondary effects law that the Court was considering. The ordinance at issue in *Alameda Books* was a classic erogenous zoning ordinance whereby the city was restricting certain land uses. It was a "place" restriction, and Justice Kennedy's proportionality analysis is easy enough to understand and to apply to such a typical zoning ordinance. The city's rationale cannot be that when it requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech. In contrast, we are faced with a quite different species of secondary effects law – a "time" restriction that forces the closure of *all* adult entertainment establishments for a limited time. We accept the proposition that such establishments tend to be patronized in the evening and late at night. Given this, the application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate *all* such laws, and we are satisfied that he never intended such a result. His proportionality requirement was simply not designed with this particular type of restriction in mind.

c

Finally, Fair Public Policy's argument that Justice Kennedy's *Alameda Books* opinion presents a new and different approach to the constitutional analysis of secondary effects law is inconsistent with the weight of authority in the wake of that decision. Courts have routinely upheld properly crafted secondary effects ordinances supported by a proper record in the wake of *Alameda Books,* and have explicitly stated that Justice Kennedy's separate decision did little, if indeed anything, to the traditional *Renton* framework. *See Z.J. Gifts D-4, LLC v. City of Littleton,* 311 F.3d 1220, 1239 n. 15 (10th Cir.2002) (seeing "nothing in . . . *Alameda Books* that requires reconsideration" of the traditional *Renton* framework); *World Wide Video of Wash., Inc. v. City of Spokane,* 227 F.Supp.2d 1143, ___ (E.D.Wash.2002) ("While *Alameda Books* may clarify existing precedent, this court is not persuaded that it fundamentally alters the legal landscape regarding adult entertainment zoning ordinances."). As the Seventh Circuit explained, "[t]he differences between Justice Kennedy's concurrence and the plurality opinion are . . . quite subtle." *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 721 (7th Cir.2003).

> Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior to* implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books,* 122 S.Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it "*may* reduce the costs of secondary effects without substantially reducing speech."

Id. (emphasis in original) (quoting *Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring)). Indeed, the plurality in *Alameda Books* considered Justice Kennedy's proportionality analysis "unobjectionable," and "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." 535 U.S. at 443, 122 S.Ct. 1728 (plurality opinion).

d

In any event, to the extent Justice Kennedy's concurrence worked any change in the traditional *Renton* framework, we are satisfied that his proportionality analysis does not apply to the particular type of regulation that we deal with here, and we reject Fair Public Policy's argument that the statute must be invalidated on the basis of his opinion. Because five members of the Supreme Court agreed that "the central holding of *Renton* is sound" we apply the traditional three-part test in order to determine the constitutionality of § 13-1422.

B

Our first task under *Renton,* then, is to determine whether the statute amounts to a complete ban on protected expressive activity. *Renton,* 475 U.S. at 46, 106 S.Ct. 925; *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion).

1

The statute at issue here is obviously not a complete ban. It is a classic time, place or manner restriction,

prohibiting sexually-oriented businesses from operating during certain nighttime hours, and until noon on Sundays. The businesses may remain open the remainder of the time, 115 hours in a 168 hour week, or approximately 5,980 hours in a calendar year. "The ordinance is therefore properly analyzed as a time, place, and manner regulation." *Renton,* 475 U.S. at 46, 106 S.Ct. 925.

2

Next, we must determine what level of scrutiny to apply. Traditionally, the Court has invoked the content based/content neutral distinction as the basis for determining which level of scrutiny to apply. *See Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content . . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.").

A regulation restricting the hours of operation of a sexually-oriented business is quite obviously content based. "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). The Arizona statute is content based on its face because whether an establishment falls within its parameters, and is therefore subject to sanction for violating the prohibition against operating during nighttime hours, can only be determined by reference to the content of the expression inside it. *See Schultz*

v. City of Cumberland, 228 F.3d 831, 843-44 (7th Cir.2000) ("[A]n ordinance that regulates only adult-entertainment businesses singles out adult-oriented establishments for different treatment based on the content of the materials they sell or display.") (internal quotation omitted). Because the statute is content based, Fair Public Policy argues that strict scrutiny should apply. Such argument is misplaced.

The Supreme Court has clearly carved out sexual and pornographic speech as one type of speech than [sic] can be subject to reasonable restriction. "Generally, the government has no power to restrict speech based on content, but there are exceptions to this rule." *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). The speech and expressive activity at issue here is one such exception; the content based/content neutral distinction simply does not fit in this context. In fine [sic], so long as the regulation is designed to combat the secondary effects of such establishments on the surrounding community, "namely at crime rates, property values, and the quality of the city's neighborhoods," *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion), then it is subject to intermediate scrutiny. *See also Colacurcio v. City of Kent,* 163 F.3d 545, 551 (9th Cir.1998) (explaining that if "the predominant purpose" of an ordinance is ameliorating secondary effects associated with sexually-oriented businesses, then it is subject to intermediate scrutiny).

"We will look to the full record" to determine whether the purpose of the statute is to ameliorate secondary effects. *Id.* at 552. "In so doing, we will rely on all 'objective indicators of intent,' including the 'face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the

record of proceedings.'" *Id.* (quoting *City of Las Vegas v. Foley,* 747 F.2d 1294, 1297 (9th Cir.1984)).

a

In this context, the first thing to note about § 13-1422 is that it regulates both establishments protected by the First Amendment – adult bookstores, video stores, cabarets, motion picture theaters and theaters – and businesses that have no such protection – escort agencies,[2] for example, suggesting that the state's purpose in enacting the statute was unrelated to the suppression of expression. In *Alameda Books,* Justice Kennedy noted the fact that the ordinance at issue was "not limited to expressive activities. It also extends . . . to massage parlors, which the city has found to cause similar secondary effects." 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring).

Furthermore, the hours regulation was passed as an amendment to Senate Bill 1162, a broader bill authorizing counties to develop comprehensive land-use regulations within their respective jurisdictions, and to promote the social value of the land as a whole. *See* Ariz.Rev.Stat. § 11-821 ("The county plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the area of

[2] An "escort agency" is "a person or business association that furnishes, offers to furnish or advertises the furnishing of escorts as one of its primary business purposes for any fee, tip or other consideration." Ariz.Rev.Stat. § 13-1422(D)(7). An "escort" is "a person who for consideration agrees or offers to act as a companion, guide or date for another person or who agrees or offers to privately model lingerie or to privately perform a striptease for another person." *Id.* § 13-1422(D)(6).

jurisdiction."). This is yet another objective indicator that the purpose of the statute was to combat the negative secondary effects associated with sexually-oriented businesses. *See Alameda Books,* 535 U.S. at 447, 122 S.Ct. 1728 (Kennedy, J., concurring) (fact that the ordinance at issue was "one part of an elaborate web of land-use regulations . . . . suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech").

There are other "objective indicators of intent" on this record. *Foley,* 747 F.2d at 1297. For example, the "fact sheet" prepared by the NFLF stated that a statewide hours regulation was necessary to curb the problems associated with sexually-oriented business, which "according to law enforcement, include noise, traffic, unlawful public sexual activity, prostitution and drug trafficking." Moreover, the majority of comments made by legislators when the bill was under consideration focused on the secondary effects associated with sexually-oriented businesses. In short, our examination of the record as a whole, *see Colacurcio,* 163 F.3d at 552, indicates that the predominant purpose in enacting this provision was to ameliorate the secondary effects associated with the regulated establishments.

b

Fair Public Policy argues that there is no pre-enactment evidence on which the legislature could rely to support its conclusion that the restrictions are warranted. But this argument confuses two separate issues which the Supreme Court has made clear need to be carefully distinguished. The 'predominant purpose' inquiry is separate

and independent from the inquiry into whether the statute is designed to serve a substantial government interest. Only with respect to the latter inquiry "did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). In short, Fair Public Policy's argument is one that was specifically considered and rejected by the Supreme Court in *Alameda Books.* Because our examination of the record as a whole indicates that, in enacting the hours of operation restriction, the Arizona legislature was concerned with curbing the negative secondary effects associated with such businesses, intermediate scrutiny applies.

3

The statute will be upheld if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication. *Renton,* 475 U.S. at 50, 106 S.Ct. 925; *Colacurcio,* 163 F.3d at 551.

a

It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial. *See Young,* 427 U.S. at 71, 96 S.Ct. 2440 (city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect"); *Renton,* 475 U.S. at 50, 106 S.Ct. 925 (noting the "vital government interests at stake"); *Alameda Books,* 535 U.S. at 435, 122 S.Ct. 1728 ("reducing crime is a substantial government interest").

Here, Arizona's specific interest is in reducing the secondary effects associated with late night operations of sexually-oriented businesses, which include noise, traffic, unlawful public sexual activity, prostitution and drug trafficking. Each of our sister circuits to have considered similar prohibitions has recognized that such an interest is a substantial one. *See, e.g., National Amusements, Inc.,* 43 F.3d at 741 (city has a substantial interest in preserving peace and tranquility for citizens during late evening hours); *Mitchell,* 10 F.3d at 133 (state's interest in preserving character and preventing deterioration of neighborhoods substantial); *Richland Bookmart, Inc.,* 137 F.3d at 440-41 (deterring "prostitution in the neighborhood at night or the creation of 'drug corners' on the surrounding streets" a substantial government interest).

The critical issue, of course, is whether the state has met its burden under *Renton* of coming forward with evidence that "demonstrate[s] a connection between the speech regulated . . . and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion).[3]

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[3] The parties argue at great length over whether or not we may consider the contents of the studies that document the secondary effects associated with sexually-oriented businesses, and that were placed in the district court record during the course of these proceedings. While the Arizona legislature was briefed on these studies, the actual studies themselves were not before the legislature prior to § 13-1422's enactment, and it is therefore so-called post-enactment evidence. However, in *Alameda Books* the Supreme Court specifically contemplated that the state could indeed rely on post-enactment evidence in support of its position, *but only* if the plaintiffs succeed in casting doubt on the state's rationale. *See Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (if "the burden shifts back" to the state, then state can "*suppiement* the record

(Continued on following page)

The pre-enactment record is a slim one, and consists of certain letters from NFLF documenting in a general sense the "acute problems" associated with sexually-oriented businesses, and discussing a Denver, Colorado study, which concluded that such establishments disproportionately deplete police time and resources during overnight hours. A "fact sheet" distributed to legislatures cited fourteen studies that documented the secondary-effects associated with adult entertainment establishments, and in particular it noted a Minnesota study establishing specific secondary effects associated with sexually-oriented businesses during overnight hours. The Arizona legislature also held public hearings and considered certain testimonial evidence, including evidence that prospective employers were concerned for the safety of their night-shift employees, and testimony from a neighborhood activist concerning the litter, prostitution, and drug use in her neighborhood.

All of the evidence the Arizona legislature considered fairly supports its rationale that prohibiting sexually-oriented businesses from operating in the late night hours will lead to a reduction in secondary effects, and generally

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with evidence renewing support for a theory that justifies the ordinance" (emphasis added)); *see also Mitchell,* 10 F.3d at 136 (examining "pre-enactment and post-enactment evidence" in determining whether state met its burden); *DiMa Corp.,* 185 F.3d at 829-30 (holding that "a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted the ordinance"); *Ben Rich Trading Inc. v. City of Vineland,* 126 F.3d 155, 161 (3d Cir.1997) (discussing city's burden of production and noting that "a record could be established in the court after legislation is passed and challenged").

enhance the quality of life for Arizona citizens. A comparison of the record before the Arizona legislature to the record amassed in prior cases that have been the subject of judicial scrutiny may be helpful in determining whether the state has carried its burden in this case. The quantum and quality of evidence here compares unfavorably to two of the circuit court cases to have considered similar restrictions. The city ordinance upheld by the Fifth Circuit was "adopted after extensive study" by the city. *Star Satellite, Inc.,* 779 F.2d at 1077-78. No such study was done here. Instead, Arizona relied on the experiences of other communities in support of its rationale. *But see Renton,* 475 U.S. at 50, 106 S.Ct. 925 (rejecting the argument that it was necessary for a city to conduct its own studies). The ordinance at issue in *Schultz v. City of Cumberland,* 228 F.3d 831, 846 (7th Cir.2000) was adopted after the city "collected and reviewed a host of studies," and here, while the legislature was *briefed* with respect to certain studies, no studies were put before the legislature prior to enactment.

The record compares favorably to the evidence considered in several other cases, however. In *Mitchell,* lawmakers "received no documents or any sworn testimony in support of the bill" and "the General Assembly did not conduct public hearings." 10 F.3d at 133. Nonetheless the Third Circuit held that the state had met its evidentiary burden under *Renton. See also DiMa Corp.,* 185 F.3d at 830-31 (city relied on factual record supporting another city's ordinance); *Ben Rich Trading Inc.,* 126 F.3d at 161 (only thing city relied on was evidence presented to state legislature two years previously).

The record here is hardly overwhelming, but it does not have to be. *See Alameda Books,* 535 U.S. at 451, 122

S.Ct. 1728, (Kennedy, J., concurring) ("very little evidence is required" to justify a secondary effects ordinance). The question is whether the Arizona legislature relied on evidence "reasonably believed to be relevant" in demonstrating a connection between its stated rationale and the protected speech, and we hold that it has done that here. The Arizona Senate and House held public hearings at which lawmakers heard citizen testimony concerning the late night operation of sexually-oriented businesses, and were briefed on several studies documenting secondary effects, and two of those studies were specific to late night operations. *See Renton,* 475 U.S. at 50, 106 S.Ct. 925 (reasonable for regulators to rely on experiences and studies of other cities, as well as legal decisions upholding similar regulations). That evidence is both reasonable and relevant, and compares favorably with the evidence presented in other cases.

i

Under *Alameda Books,* the burden now shifts to Fair Public Policy to "cast direct doubt on [the state's] rationale, either by demonstrating that the [state's] evidence does not support its rationale or by furnishing evidence that disputes the [state's] factual findings." 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Fair Public Policy's primary argument on appeal is that the evidence before the Arizona legislature consisted of "irrelevant anecdotes" and "isolated" incidents, and that testimonial evidence is not "real" evidence. If Fair Public Policy means to argue that such evidence is improper, its argument is erroneous, and simply misconstrues the nature of the legislative process. Legislative committees are not judicial tribunals, and they are not bound by rules of evidence. As the First

Circuit explained when confronted with a similar argument,

> A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it reasonably believes to be relevant to the problem at hand.

National Amusements, Inc., 43 F.3d at 742 (internal quotation and citations omitted); *see also World Wide Video of Wash.*, 227 F.Supp.2d 1143 ("[A]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects.") (quoting *Stringfellow's of N.Y., Ltd. v. City of New York*, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 417 (1998)).

To the extent Fair Public Policy argues that the state needs to come forward with empirical data in support of its rationale, that argument was specifically rejected in *Alameda Books*. 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion) ("Such a requirement would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech.") (internal quotation omitted); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring) ("legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects").

Fair Public Policy has failed to cast doubt on the state's theory, or on the evidence the state relied on in support of that theory. "Precedent . . . commands that courts should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects." *Charter Comm's, Inc. v. County of Santa Cruz,* 304 F.3d 927, 932 (9th Cir.2002). Since the state relied on evidence that is "reasonably believed to be relevant," *Renton,* 475 U.S. at 52, 106 S.Ct. 925, we are satisfied that it has met its evidentiary burden.

b

The narrow tailoring requirement is satisfied so long as the government's asserted interest "would be achieved less effectively absent the regulation." *Colacurcio,* 163 F.3d at 553 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

It appears self-evident that the government's asserted interest – the amelioration of secondary effects associated with late night operation of sexually-oriented businesses, including prostitution, drug use and littering – would be achieved less effectively in the absence of the statute. Fair Public Policy argues that the Arizona legislators did not consider any evidence particular to late night hours, but this assertion is belied by the record. Testimonial evidence was introduced specific to the late night operation of such businesses, and the legislature was briefed on two studies specific to problems associated with nighttime operation of sexually oriented businesses. *See National Amusements, Inc.,* 43 F.3d at 744 ("It is within a government's purview to conclude that such secondary effects as late-night noise

and traffic are likely to adhere to all [adult] entertainment.").

Nor does the fact that the statute does not permit such establishments to operate prior to noon on Sundays render it overly-broad. The Eleventh Circuit considered and rejected precisely the same argument in *Lady J. Lingerie:*

> [T]he plaintiffs would have us look at the City's reasons for this rule on an hour by hour basis. There is no evidence, they submit, of a substantial government interest to justify requiring adult businesses to close from 10:00 a.m. until noon. This is a clever argument, but it confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end . . . . If we were to side with the plaintiffs here, the next litigants would argue whether evidence of secondary effects at 6:15 in the morning justifies requiring adult businesses to close at 9:30, or whether evidence from 9:30 justifies requiring them to close at 10:45. That sort of line-drawing is inconsistent with a narrow tailoring requirement that only prohibits regulations that are "substantially broader than necessary."

176 F.3d at 1365 (quoting *Ward,* 491 U.S. at 800, 109 S.Ct. 2746).

Furthermore, all six circuits to have considered hours of operation restrictions such as the one at issue here were confronted with regulations containing special provisions for Sunday closing. Indeed, four circuits have upheld regulations that prohibit Sunday hours altogether. *See Ben Rich Trading,* 126 F.3d at 158; *Schultz,* 228 F.3d at 837; *Star Satellite,* 779 F.2d at 1079; *Richland Bookmart, Inc.,*

137 F.3d at 438. Two other circuits have upheld regulations prohibiting sexually-oriented businesses from operating before noon on Sunday, as here. *See Mitchell,* 10 F.3d at 128; *Lady J. Lingerie,* 176 F.3d at 1365. In short, because Arizona's interest in ameliorating secondary effects "would be achieved less effectively absent the regulation," *Colacurcio,* 163 F.3d at 553 (quotation omitted), it satisfies the narrow tailoring requirement.

c

Finally, the statute must "leave open ample alternative channels for communication." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. "The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Colacurcio,* 163 F.3d at 554.

The statute permits the businesses that come within its purview to operate seventeen hours per day Monday through Saturday, and thirteen hours on Sunday, a total of approximately 5,980 hours per year. In *Mitchell,* the Third Circuit found that a similar restriction "allows those who choose to hear, view, or participate publically in sexually explicit expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more." 10 F.3d at 139. We find that the statute leaves open "ample alternative channels for communication." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746.

III

As an alternative ground for finding the statute unconstitutional, Fair Public Policy argues that it is unconstitutionally underinclusive. The argument is that the state's decision to close sexually-oriented businesses during late night hours must be assessed in light of other types of business which the state permits to operate at night. According to Fair Public Policy, the state must demonstrate that *greater* late night problems are posed by sexually-oriented businesses than by non-regulated businesses, and if it does not, the statute is underinclusive and is therefore subject to strict scrutiny.

Fair Public Policy's first major problem is that this argument runs straight into the Supreme Court's decision in *Renton.* The adult theater plaintiffs in that case argued that the ordinance at issue was underinclusive because it failed to regulate other kinds of adult businesses that are just as likely to produce secondary effects similar to those produced by adult theaters. *Renton,* 475 U.S. at 52, 106 S.Ct. 925. The Court rejected this argument, holding that simply because the city "chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment." *Id.* at 53, 106 S.Ct. 925.

Fair Public Policy gamely attempts to distinguish *Renton* by pointing out that the Court in *Renton* dealt with a comparison of *one kind* of adult entertainment business with *other kinds* of adult entertainment businesses, whereas their argument here is that the state may not single out the *entire industry* of adult entertainment. As we have previously explained, however, the Supreme

Court has consistently stated that so long as the legislature's motive is the amelioration of secondary effects, sexually-oriented businesses may indeed be singled out. As the Supreme Court in *R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), explained,

> [T]he First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content . . . . Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is *justified* without reference to the content of the speech.

Id. at 387, 389, 112 S.Ct. 2538 (emphasis in original) (citations and quotations omitted).

The State "may choose to treat adult businesses differently from other businesses . . . ." *Isbell, G and B Emporia, Inc.,* 258 F.3d 1108, 1116 (9th Cir.2001); *see also Young,* 427 U.S. at 70-71, 96 S.Ct. 2440 ("[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."). If this is true as a general proposition, then it must also be true as to the specific proposition that a state may single out sexually-oriented businesses to regulate their hours of operation. *See Ben Rich Trading, Inc.,* 126 F.3d at 163 ("[A] municipality may regulate hours

of adult businesses differently than other businesses without raising a strong inference of discrimination based on content.").

IV

In short, we reject Fair Public Policy's argument that we need to assess the regulation in light of how other classes of businesses are treated under Arizona law.[4] The State may choose to treat adult businesses differently from other businesses so long as it does so for the right reasons, and it has done that here. It need do no more.

The judgment of the district court is **AFFIRMED**.

CANBY, Circuit Judge, dissenting:

I dissent from the majority opinion because I conclude that it is inconsistent with *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). As the majority here recognizes, the focus of our examination of *Alameda Books* is the opinion of Justice Kennedy, because there was no majority opinion and Justice Kennedy's concurring opinion was the one that supported the Court's judgment on the narrowest grounds.

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[4] Though we reject Fair Public Policy's argument that the statute needs to be assessed in light of how other classes of business are treated, we note in passing that Arizona law does indeed provide for restrictions on the nighttime operation of other classes of business. *See, e.g.*, Ariz.Rev.Stat. § 44-1632 ("A city or town may adopt an ordinance prohibiting the operation of pawnshops from 12:00 a.m. to 6:00 a.m."); Ariz.Rev.Stat. § 4-244(15) ("It is unlawful . . . . to sell, dispose of, deliver or give spiritous liquor to a person between the hours of 1:00 a.m. and 6:00 a.m. on weekdays, and 1:00 a.m. and 10:00 a.m. on Sundays.").

See Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

Like the four dissenters in *Alameda Books,* Justice Kennedy viewed the regulation of adult entertainment businesses to be content-related, because the businesses to be regulated are identified by the content of their speech. *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring). Yet Justice Kennedy agreed with *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), that a regulation that is "designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728.

Justice Kennedy, however, imposed important conditions as part of this intermediate scrutiny. The question in issue in *Alameda Books* was whether the city's ordinance was invalid because the city did not study the secondary effects of the precise use being regulated, but relied on judicially approved precedent from other jurisdictions. Justice Kennedy stated that this issue involved two questions:

> First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?

Id. at 449, 122 S.Ct. 1728. Unlike the plurality opinion, Justice Kennedy focused on the first question, and imposed requirements that are crucial to the present case. He elaborated:

> [A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the

> quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. *A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.*

Id. (emphasis added).

Applying this reasoning to the Los Angeles ordinance that prohibited two or more adult entertainment businesses from operating in the same building, Justice Kennedy made his point once again:

> It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.
>
> The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. *The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice . . . .*
>
> . . . . The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced.

Id. at 450-51, 122 S.Ct. 1728 (emphasis added). Having thus answered his first sub-question, Justice Kennedy then agreed with the plurality with regard to his second: There was sufficient evidence to support the proposition

that forced dispersal of two such businesses was reasonably likely to reduce secondary effects at little cost to speech. *Id.* at 452-53, 122 S.Ct. 1728.

The closing-hours statute in issue here, however, proceeds on precisely the theory that Justice Kennedy found insupportable under the First Amendment. The theory is that adult entertainment establishments [1] create adverse secondary effects when they are in operation. If operation is prohibited for several hours each day, the undesirable secondary effects will be reduced accordingly. Unlike a dispersal regulation, the state's instrument is not to move speech, but to stop it. And Justice Kennedy has informed us that "a city may not attack secondary effects indirectly by attacking speech." *Id.* at 450, 122 S.Ct. 1728. A government similarly may not proceed on a theory that "it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449, 122 S.Ct. 1728. It would be hard to find a more exact description than this of Arizona's closing hour regulation of adult entertainment establishments.

The record in the present case cannot sustain any other theory than the impermissible one. The majority opinion candidly characterizes the pre-enactment support for the statute as "slim." Indeed, it is so slim that I have grave doubts that it suffices under *Renton* without the

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[1] I use the term "adult entertainment establishments" to refer to expressive activities such as those conducted by the plaintiffs. As the majority opinion points out, the statutory term "sexually-oriented businesses" includes escort services that presumably are not engaged in First Amendment-protected activity. My discussion does not relate to them.

gloss of *Alameda Books*. I need not address that point, however, because the record clearly fails to support a permissible theory of regulation under Justice Kennedy's test in *Alameda Books*. The evidence in both the legislature and the district court was almost entirely concerned with secondary effects that are unrelated to the hours of occurrence. Studies of the effects of adult entertainment businesses on the crime rate were mentioned in legislative hearings, but none were put into the legislative record. A Minnesota study was said to have reported adverse effects from 24-hour operation of adult establishments, but the study was not produced to the legislature. A study by the city of Phoenix, Arizona, was briefly referred to as having explored the effect of nighttime operation of adult establishments but was said to be "inconclusive"; it also was not produced. Another reference was made to a study by Fulton County, Georgia (also not produced for the legislature), but its conclusions tended to show no disproportionate adverse effect on crime rate because of operation of adult entertainment businesses. *See Flanigan's Enterprises, Inc. v. Fulton County,* 242 F.3d 976, 979 (11th Cir.2001) (describing Fulton County study). The focus of secondary effects in the record was on those effects generally, not on secondary effects caused by late-night operations, and certainly not on *disproportionate* secondary effects of late-night operations. Finally, there is a total absence of evidence anywhere in the record to support the existence of disproportionate secondary effects from operation on Sunday mornings before noon. (Indeed, the required closing on Sunday mornings might suggest to a reasonable observer that something other than the mere regulation of secondary effects was going on in the legislature, but I need not pursue that question here.)

As for the effect of the statute on speech, there is no question that speech is simply stopped during the hours of forced closure. Several affidavits filed in district court asserted that many customers of adult establishments held two jobs and could not patronize the establishments except during hours subject to the closure. Another stated that closure during the targeted hours caused a twenty-five percent decline in gross revenues of an adult establishment. All in all, the record overwhelmingly establishes that the closure, *at best,* achieves a one-for-one elimination of speech and secondary effects – a formula that fails to meet the requirements of the First Amendment as Justice Kennedy has stated them.

The majority opinion here addresses Justice Kennedy's concurrence, but concludes that he did not mean his statements to apply to the present situation. The majority holds that Justice Kennedy meant no change in the *Renton* analysis because he said "the central holding of *Renton* is sound." *Id.* at 448, 122 S.Ct. 1728. But that statement came after Justice Kennedy departed from *Renton*'s assumption that regulation of adult entertainment establishments to limit secondary effects was not content-based. Justice Kennedy stated that this fiction was not useful, and that it was better to admit that such regulations *were* content-based. Such an admission would normally call for review under a strict scrutiny, but Justice Kennedy did not accept that consequence. It is with regard only to the standard of review that he then said: "[T]he central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* To read this statement as a wholesale

endorsement of an unmodified *Renton* analysis is to ignore context.[2]

The majority opinion also refers to Justice Kennedy's statement that he feared the plurality opinion's "application of *Renton* might constitute a subtle expansion, with which I do not concur." *Id.* at 445, 122 S.Ct. 1728. Here again, it over-reads Justice Kennedy's statement to accept it as an endorsement of *Renton* without the gloss Justice Kennedy adds to the analysis in his opinion. If Justice Kennedy thought that the *Renton* analysis was correct, except for its denomination of the ordinance as content-neutral, he could have stated that minor disagreement and joined all the rest of the plurality opinion. His major reason for writing was to establish that the plurality's analysis was deficient because it did "not address how speech will fare under the city's ordinance." *Id.* at 450, 122 S.Ct. 1728. He then spends nearly all of the remainder of his opinion explaining his rule that a government cannot reduce secondary effects by reducing speech on a one-for-one basis. That is what Arizona has done here. I would

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[2] The majority opinion quotes the Tenth Circuit opinion in *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220, 1239 n. 15 (10th Cir.2002), for the proposition that "'nothing in . . . *Alameda Books* requires reconsideration' of the traditional *Renton* framework." The Tenth Circuit's statement, however, was that "nothing in . . . *Alameda Books* requires reconsideration of our conclusion as to the applicable standard of review." *Id.* The Tenth Circuit was merely in agreement with Justice Kennedy that intermediate review was appropriate, not strict scrutiny as Z.J. Gifts was arguing. The Tenth Circuit said nothing about leaving the *Renton* "framework" intact.

Nor is the Seventh Circuit's description of Justice Kennedy's opinion, *see Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 721 (7th Cir.2003), inconsistent with my reading of it.

take Justice Kennedy at his word and on this record would hold Arizona's statute to be in violation of the First Amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

L.J. CONCEPTS, INC., et al., Plaintiffs, v. CITY OF PHOENIX, an Arizona municipal corporation, et al., Defendants.	CIV 98-1583 PHX EHC (LEAD) CIV 98-1584 PHX EHC (consolidated) **JUDGMENT** (Filed Sept. 13, 2000)

ORDERED AND ADJUDGED that Judgment is entered against the Plaintiffs and in favor of all Defendants and the Complaint and this action are hereby dismissed.

RICHARD H. WEARE,
CLERK/DCE

September 13, 2000 — Date

/s/ L Dixon — Deputy Clerk

cc: All Counsel of Record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

L.J. CONCEPTS, INC., et al., Plaintiff, vs. CITY OF PHOENIX, an Arizona municipal corporation, et al., Defendants.	Case No.: No. CV 98-1583-PHX EHC CIV 98-1584 PHX SMM (consolidated) ORDER, AND ORDER FOR ENTRY OF JUDGMENT (Filed Sept. 13, 2000)
CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; et al, Plaintiff, vs. MARICOPA COUNTY, Arizona; RICHARD M. ROMLEY, etc.; et al, Defendants.	

This Court having denied Plaintiffs' Motion for Preliminary Injunction, that Order having been appealed and affirmed, and the case now being back before this Court for final resolution of Plaintiffs' requests for permanent injunction and declaratory relief, and the parties having stipulated that:

(1) No party intends to offer any additional evidence;

(2) No party intends to offer any additional arguments;

(3) Pursuant to the spirit of Rule 65, F.R.C.P., the Court may treat the preliminary injunction issue as consolidated with the trial on the merits, and that the Court's order denying the preliminary injunction dated September 30, 1999 (Docket 57) may be treated as an order denying Plaintiffs' requests for permanent injunction and declaratory relief;

(4) The bonds posted by Plaintiffs ($500.00 in Cause No. CV 98-1584-PHX-SMM and $5,000.00 in Cause No. CV 98-1583-PHX-EHC) shall be exonerated. The $500.00 bond in Cause No. CV 98-1584-PHX-SMM shall be paid to Weston, Garrou & DeWitt, Plaintiffs' counsel in that case, and the $5,000.00 in Cause No. CV 98-1583-PHX-EHC shall be paid to Richard J. Hertzberg, Plaintiffs' counsel in that case.

IT IS HEREBY ORDERED that:

(1) Plaintiffs' requests for permanent injunction and declaratory relief are denied for the reasons stated in this Court's order of September 30, 1999 (Docket 57), which order is incorporated herein be reference.

(2) That the bonds posted by Plaintiffs ($500.00 in Cause No. CV 98-1584-PHX-SMM and $5,000.00 in Cause No. CV 98-1583-PHX-EHC) shall be exonerated. The $500.00 bond in Cause No. CV 98-1584-PHX-SMM shall be paid to Weston, Garrou & DeWitt, Plaintiffs' counsel in that case, and the $5,000.00 in Cause No. CV 98-1583-PHX-EHC shall be paid to Richard J. Hertzberg, Plaintiffs' counsel in that case.

(3) IT IS FURTHER ORDERED that judgment be entered against Plaintiffs in favor of all Defendants.

DATED this 12th day of September, 2000.

/s/ Earl H. Carroll
Earl H. Carroll,
United States
District Judge

APPENDIX D

RICHARD J. HERTZBERG, Bar 31040
11 W. Jefferson, #16 Luhrs Arcade
Phoenix, AZ 85003
(602) 253-1781
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

L.J. CONCEPTS, INC., et al., Plaintiff, vs. CITY OF PHOENIX, an Arizona municipal corporation, et al., Defendants.	Case No.: No. CV 98-1583-PHX EHC CIV 98-1584 PHX SMM (consolidated) STIPULATION
CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; et al, Plaintiff, vs. MARICOPA COUNTY, Arizona; RICHARD M. ROMLEY, etc.; et al, Defendants.	

This Court having denied Plaintiffs' Motion for Preliminary Injunction, and said order having been appealed and affirmed, and the case now being back before the District Court on the issue of permanent injunction and request for declaratory relief, all of the parties in the above-entitled consolidated cases Stipulate as follows:

(1) No party intends to offer any additional evidence.

(2) No party intends to make any additional argument.

(3) The parties stipulate, pursuant to the spirit of Rule 65, F.R.C.P., that the Court may treat the preliminary injunction matters as consolidated with the trial on the merits and that the Court's order denying the preliminary injunction dated September 30, 1999 be treated as a denial of the permanent injunction and a denial of Plaintiffs' request for declaratory relief.

(4) Alternatively, the parties stipulate that this Court may deem the remaining issues in the case (request for permanent injunction and request for declaratory relief) submitted and may proceed to rule upon them.

(5) The bonds posted by Plaintiffs ($500.00 in Cause No. CV 98-1584-PHX-SMM and $5,000.00 in Cause No. CV 98-1583-PHX-EHC) shall be exonerated. The $500.00 bond in Cause No. CV 98-1584-PHX-SMM shall be paid to Weston, Garrou & DeWitt, Plaintiffs' counsel in that case, and the $5,000.00 in Cause No. CV 98-1583-PHX-EHC shall be paid to Richard J. Hertzberg, Plaintiffs' counsel in that case.

(6) All parties reserve the right to appeal this Court's final judgment once entered.

DATED this ___ day of August, 2000.

/s/ Richard J. Hertzberg
RICHARD J. HERTZBERG,
Attorney for Plaintiffs in
CV 98-1583-PHX-EHC

/s/ John H. Weston
JOHN H. WESTON,
Attorney for Plaintiffs in
CV-98-1584-PHX-SMM

JANET NAPOLITANO,
Arizona Attorney General

By /s/ Leslie Hall
LESLIE HALL,
Assistant Arizona
Attorney General

/s/ Scott Boehm
SCOTT BOEHM,
Attorney for Defendant
MARICOPA COUNTY

GLENDALE CITY ATTORNEY

By /s/ Gary Verburg
GARY VERBURG,
Assistant Glendale
City Attorney

/s/ Donald E. Loeb
DON E. LOEB,
Attorney for Defendant
CITY OF PHOENIX

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

L. J. CONCEPTS, INC., an Arizona corporation; STUMMER LLC, INC., an Arizona corporation; MID-CITY ENTERPRISES, INC., an Arizona corporation; B.C. BOOKS, INC., a Delaware corporation; MICHAEL J. AHEARN,

Plaintiffs-Appellants,

DANIEL RAY GOLLADAY,

Plaintiff,

v.

CITY OF PHOENIX, a municipal corporation; CITY OF GLENDALE, an Arizona municipal corporation,

Defendants-Appellees,

STATE OF ARIZONA,

Intervenor-Appellee.

No. 99-17270

D.C. No. CV-98-1583-EHC

(Filed Mar. 30, 2000)

CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; DREAM PALACE, an Arizona Limited Liability Company, dba/Liberty Entertainment Group, L.L.C.; CASTLE SUPERSTORE CORPORATION, an Arizona corporation,

Plaintiffs-Appellants,

CITY OF PHOENIX, an Arizona municipal corporation; MARICOPA COUNTY, of Arizona,

Defendants-Appellees,

RICHARD M. ROMLEY, in his official capacity as Maricopa County Attorney,

Defendant,

STATE OF ARIZONA,

Intervenor-Appellee.

No. 99-17271
D.C. No.
CV-98-01584-EHC
MEMORANDUM[1]

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Submitted March 20, 2000[2]

Before: FARRIS, CANBY, and W. FLETCHER, Circuit Judges.

These consolidated preliminary injunction appeals come to us for review under Ninth Circuit Rule 3-3. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

Our inquiry is limited to whether the district court has abused its discretion in denying a preliminary injunction or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). The record before us shows that the district court did not rely upon an erroneous legal premise or abuse its discretion by concluding that appellants were not entitled to injunctions. *See Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1517 (9th Cir. 1992).

Accordingly, the district court's order is

AFFIRMED.

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[2] The panel unanimously finds this case suitable for decision without oral argument. Accordingly, appellants' request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2). The panel grants the motion by Community Defense Counsel and Center for Arizona Policy for leave to file an amicus brief.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

L.J. CONCEPTS, INC., et al., Plaintiffs, v. THE CITY OF PHOENIX, an Arizona municipal corporation, et al., Defendants, STATE OF ARIZONA, Intervenor.	CIV 98-1583 PHX EHC CIV 98-1584 PHX EHC (Consolidated) **ORDER** (Filed Sep. 30, 1999)
CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; DREAM PALACE, a dba of Liberty Entertainment Group, L.L.C., an Arizona Limited Liability Company; and CASTLE SUPERSTORE CORPORATION, an Arizona corporation, Plaintiffs, v. MARICOPA COUNTY, Arizona; RICHARD M. ROMLEY, in his official capacity as Maricopa County Attorney; and THE CITY OF PHOENIX, a municipal corporation, Defendants.	

Plaintiffs bring this consolidated action challenging the constitutionality of Ariz. Rev. Stat. § 13-1422,[1] a state statute that purports to limit the hours of operation of certain sexually oriented businesses. On September 2, 1998, the Court entered a temporary restraining order in CIV 98-1583-PHX-EHC enjoining the City of Phoenix from enforcing the statute against the plaintiff businesses. Two days later, a second temporary restraining order was issued in CIV 98-1584-PHX-SMM against the City of Phoenix and Maricopa County. The Court found in both cases that Plaintiffs presented serious questions worthy of litigation and faced the risk of irreparable injury. On December 4, 1998, these two cases were consolidated.

Presently before the Court is Plaintiffs' application for preliminary injunction, wherein it is requested that the Court Enjoin Defendants from enforcing Ariz. Rev. Stat. § 13-1422 on grounds that it violates the United States Constitution.

I. Background

Ariz. Rev. Stat. § 13-1422 ("the statute") regulates the hours of operation of certain "sexually oriented businesses."[2] The statute, which became effective on August 21, 1998, requires sexually oriented businesses to close between the hours of 1:00 a.m. and 8:00 a.m. on Monday

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[1] Renumbered from § 13-1421.

[2] Sexually oriented businesses include adult arcades, adult bookstores or video stores, adult cabarets, adult motion picture theaters, adult theaters, escort agencies and nude modeling studios. Ariz. Rev. Stat. § 13-1422(A).

though Saturday, and between the hours of 1:00 a.m. and 12:00 noon on Sunday. Violation of the statute is a Class 1 Misdemeanor.

Plaintiffs represent a wide array of adult establishments that are targeted for prosecution under the statute.

Defendants have advanced a number of purported negative secondary effects that it argues the statute was intended to decrease. The negative secondary effects identified in the legislative record include crime, prostitution and other forms of illicit sexual activity, public sexual indecency, the health risk concerning the spread of transmissions of AIDS and other HIV related diseases, litter (much of it sexual in nature), traffic, lowered real estate values, depletion of police time and resources during overnight hours, safety of citizens (children and adults), noise, urban redevelopment and drugs.

III. [sic] DISCUSSION

A. Standard for Preliminary Injunction

At the outset, it is important to note that a preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997). In the Ninth Circuit, a party may obtain preliminary injunctive relief by satisfying one of two tests. The traditional test requires: 1) a strong likelihood success on the merits; 2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted; 3) a balance of hardships favoring the plaintiff; and 4) advancement of the public interest. *See Johnson v. California State Bd. of Accountancy*, 72 F.3d

1427, 1430 (9th Cir. 1995) (quoting *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)). Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either: 1) a combination of probable success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *See id.* (citations omitted). Under part two of the "alternative" test, the moving party must show "as an irreducible minimum that there is a fair chance of success on the merits." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994); *See also San Antonio Community Hospital, v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1234 (9th Cir. 1997). Undeniably, a common denominator among these "tests" is, at the minimum, the necessity of demonstrating that there is a "fair chance" of success on the merits. Consequently, our analysis will concentrate on plaintiffs' likelihood of success on the merits for each of their claims.

B. Constitutional Challenges to the Statute

1. First Amendment Claim

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or the press." Additionally, the Fourteenth Amendment protects these freedoms from any abridgement by state government. When analyzing a First Amendment free speech issue the threshold question is deciding whether the challenged law is content-based or content-neutral.

If the regulation of sexually explicit materials is aimed primarily at suppression of First Amendment

rights, then it is considered to be content-based and, unless justified by a compelling government interest, is presumptively unconstitutional. *See Renton,* 475 U.S. at 46-48. However, if the regulation's primary purpose is to ameliorate the socially adverse secondary effects of speech-related activity, it is deemed content-neutral, and subject to intermediate scrutiny as a traditional time, place, or manner regulation. *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Time, place, and manner regulations of protected speech are valid if: 1) they are justified without reference to the content of the regulated speech; 2) they are narrowly tailored to serve a significant or substantial government interest; and 3) they leave open ample alternative channels of communication.[3] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Renton*, 475 U.S. at 47-48.

A regulation is content-neutral if it is "justified without reference to the content of the regulated speech." *Renton,* 475 U.S. at 48; *See also Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1058-59 (9th Cir. 1986). This requirement is also met if the statute is "aimed to control secondary effects resulting from the protected expression rather than at inhibiting the protected expression itself." *Tollis Inc. v.*

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[3] An alternative is the four part test that the Supreme Court laid out in *United States v. Brien,* 391 U.S. 367 (1968). The Eleventh, Seventh and Third Circuit Court of Appeals, in upholding the constitutionality of closing hours ordinances, have considered both tests and essentially agreed that similar outcomes would result under both tests, and that is basically the same test with different wording. *See Dima Corp. v. Town of Hallie,* 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Del.*, 10 F.3d 123 (3d Cir.1993).

San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. 1987). The justification advanced by the Defendants is to combat the negative "secondary effects" of sexually-oriented businesses. The statute does not directly regulate the expressive conduct that is the basis for the plaintiffs' First Amendment challenges. Because the statute at issue here was enacted not to suppress the expressive conduct at the sexually-oriented businesses, but to ameliorate the harmful secondary effect commonly associated with adult businesses, the statute is deemed content-neutral. Thus, the statute passes the first requirement.

Government's Burden in Establishing a Legislative Record

In response to a First Amendment challenge, the municipality bears the burden of showing that there is evidence that supports its justification. However, this burden is not overwhelming. *See Dima Corp. v. Town of Hallie*, 185 F.3d 823, 829 (8th Cir. 1999). The Ninth Circuit clarified the actual level of this burden in *Tollis*: "[a]t a minimum, there must be a **logical** relationship between the evil feared and the method selected to combat it." *Tollis,* 827 F.2d at 1332-33 (emphasis added). "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably **believed to be relevant to the problem that the city addresses.**" *City of Renton v. Playtime Theatres Inc.,* 475 U.S. 41, 49 (1986). Thus, Defendants must show that the statute was enacted with a reasonable or at least logical belief that it would help remedy the "secondary effects" of sexually-oriented businesses.

The record shows that the Legislators did have evidence provided to them, orally and in writing, that supports the content-neutral status of the statute. The members of the Senate and the House received a fact sheet that summarized the secondary effects generated by sexually oriented businesses, discussed cases that have upheld the constitutionality of restricting hours of operation for those businesses, and cited a study that found a link between 24-hour-a-day or late night operation of sexually oriented businesses and negative effects such as prostitution, drug trafficking, sexual assaults, public sexual indecency, littering of homes with sexually explicit material, noise and traffic. *See* Exhibit D.2 (citing Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (Minnesota June 6, 1989)). Additionally, a letter was given to all members of the House that described a study done by Glendale, Colorado that highlighted the number of crimes and disturbances within the hours of 1:00 a.m. and 8:00 a.m.. The letter further described two recent Circuit Court of Appeals decisions that upheld similar laws that were even more restrictive than the one in question here. *See* Exhibit C.2 (quoting *Richland Bookmart v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Mitchell v. Comm'n on Adult Entertainment Establishment*, 10 F.3d 123 (3d Cir. 1993)).

In addition to the written evidence, testimony before the relevant committees supports the content neutral basis for the enactment of the statute. Legislators and advocates of the statute testified to examples of secondary effects in their neighborhoods, the recent cases where limits on hours of operation for sexually oriented businesses have been upheld, and the existence of 15 governmental studies where the negative effects of sexually

oriented businesses are documented. *See* Exhibit A.1 at 5; Exhibit A.3 at 40-44; Exhibit A.3 at 33 (Senator Peterson testified that "every law enforcement study throughout the country that has looked at this type of business has said there's [sic] a direct relation." *Id.*)

Although at a minimum, the record shows that evidence did exist at the time of the statute's enactment[4] that would support a logical and reasonable belief that the statute would combat the targeted secondary effects of sexually oriented businesses. While the legislative record is not extensive in this regard, it does contain evidence of testimony, fact sheets, and letters regarding studies and cases from other jurisdictions that sufficiently illustrates a logical relationship between the statute enacted and the intent to combat the secondary effects of sexually-oriented businesses.[5] *See Tollis,* 827 F.2d at 1332-33.

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[4] In the briefs and in the courts, disputes exist as to whether post-enactment evidence can be considered by the court. However, as the court finds that sufficient evidence existed at the time of the enactment, the court need not address this issue. Sufficient evidence surely exists now in the voluminous exhibits filed by the Defendants that would support a finding that a logical and reasonable belief exists that this statute will combat the targeted "secondary effects" of sexually-oriented businesses.

[5] While Plaintiff is correct that some evidence existed in the record that showed no correlation or relation between sexually-oriented business and crime, this evidence is irrelevant in determining whether evidence existed that support [sic] the Defendants' conclusions. *See Dima,* 185 F.3d at 831. If the role of this court was to determine the objective truth of the relationship between sexually-oriented businesses and the "secondary effects" they cause, then the contradictory evidence would be relevant. The Legislature has the job of listening and sifting through the proffered evidence before making the political judgments that best serve their constituents. This Court's role is not to judge how

(Continued on following page)

However, in order for the statute to withstand Constitutional scrutiny, the statute must be narrowly tailored to serve a significant or substantial government interest and leave open ample alternative avenues of communication. *See Renton*, 475 U.S. at 47.

Narrowly Tailored to Serve a Substantial Government Interest

First of all, it is well settled that combating "secondary effects" of sexually-oriented businesses is a significant government interest. *See Renton,* 475 U.S. at 50. *See also Richland Bookmart Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) ("reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a substantial government interest") ; *Tollis Inc. v. San Bernardino County,* 827 F.2d 1329, 1332 (9th Cir. 1987) ("the County has a substantial interest in preventing the deleterious secondary effects often associated with adult theaters").

To satisfy the narrow tailoring requirement of the intermediate scrutiny test, a regulation need not be the least speech-restrictive means of achieving the government's interests. *Turner Broadcasting*, 512 U.S. at 662. A rule is narrowly tailored as long as it is "not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. The United States Supreme Court has even put this test in terms that make

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well the Defendants did their job, the task at hand is to determine whether the law enacted violates the Constitution. *See id.*

it relatively simple to meet. In *Ward,* the Court stated that the test is satisfied "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward,* 491 U.S. at 799 (quoting *United States v. Albertini,* 472 U.S. 675, 689 (1985)). Additionally, legislatures must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. *See Renton,* 475 U.S. at 52. In enacting the closing hours restriction to combat the stated "secondary effects," by reasonably relying on the evidence before it, the Defendants have not run afoul of the narrow tailoring requirement. Creating hours of operation limitations for sexually-oriented businesses with the intent of combating the purported adverse secondary effects they create is not a statute "substantially broader than necessary." *See Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir. 1999) (the court upheld a rule requiring sexually-oriented businesses to close from 2 a.m. to 12 noon everyday); *Ben Rich Trading, Inc v. City of Vineland,* 126 F.3d 155 (3rd Cir. 1997) (the court upheld a city ordinance limiting operation of sexually oriented businesses to 8 a.m. to 10:00 p.m. Monday through Saturday). Such a statute will surely combat the purported "secondary effects" of sexually oriented businesses more effectively than no statute at all.

Alternative Avenues of Communication

The statute leaves open alternative avenues of communication. Access to sexually-oriented businesses is not unduly restricted by the legislation. These businesses may be open 17 hours a day Monday through Saturday, and 13 hours on Sunday. This works out to a total of more than 5900 hours per year that sexually-oriented businesses may

be open. As the Third Circuit Court of Appeals stated in *Mitchell,* "the [statute] allows those who choose to hear, view, or participate publically in sexually explicit expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more." *Mitchell,* 10 F.3d at 139. Thus, the court finds that the statute leaves open ample alternatives [sic] channels of communication.

2. Equal Protection Claim

Plaintiffs also assert that the statute violates its [sic] right to equal protection of the laws. Much of Plaintiffs' argument is directed on securing the standard of strict scrutiny review, and in the statute's "underinclusiveness" in that it does not include other businesses they allege cause the same "secondary effects." Specifically, Plaintiffs alert the court to the exclusion of massage parlors.

As discussed above, strict scrutiny is not the appropriate standard of review where the regulation's primary purpose is to ameliorate the socially adverse secondary effects of speech-related activity. In this instance, the statute is deemed content-neutral, and subject to intermediate scrutiny as a traditional time, place, or manner regulation. *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Since the statute is analyzed as one being content-neutral, it does not trigger strict scrutiny under the [sic] either the First Amendment or the Equal Protection Clause. *See Turner,* 514 U.S. at 642; *See also Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 327 (9th Cir. 1996). As discussed in the previous section, the statute passes muster under intermediate scrutiny analysis. The statute

is narrowly tailored to serve a significant government interest.

To the extent Plaintiffs assert the statute's "underinclusiveness," the court finds no merit in that claim. That the Legislature chose to address the potential problems caused by the sexually-oriented businesses it decided to regulate does not suggest that they have singled out those businesses for discriminatory treatment. *See Renton,* 475 U.S. at 52. The Legislature was presented with evidence and made a decision based upon that information. There is no reason to believe that presented with evidence that other businesses contribute to these "secondary effects" that the Legislature would not amend the statute to include these other businesses. *See id.*

3. Overbroad as Applied to Adult Arcade

Plaintiffs argue that the statute is overbroad as it applies to adult arcades. However, a plain reading of the statute refutes this claim. The statute defines an "adult arcade" as

> any place to which the public is permitted or invited and in which coin-operated or slug-operated . . . motion picture machines, projectors or other image producing devices are maintained to show images involving specific sexual activities or specific anatomical areas to persons in booths or viewing rooms.

Thus, a reading of the definition indicates that an adult arcade is one that has machines "maintained to show . . . sexual activities." An arcade that does not show sexual activities would not be included in the definition. Hence, the statute is not impermissibly broad. The court finds

that Plaintiffs do not show a "fair chance" of success on the merits for this claim.

4. Establishment Clause Claim

In considering whether a statute violates the Establishment Clause courts look to the test enunciated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, government action violated the Establishment clause only if: 1) it does not have a secular legislative purpose; or 2) its "principal or primary effect" is to advance or inhibit religion; or 3) it fosters an "excessive government entanglement" with religion. *Lemon*, 403 U.S. at 612-13.

The statute was enacted with the purported legislative intent of reducing the "secondary effects" of sexually-oriented businesses. This is a secular purpose. Similarly, the statute neither has the primary effect of advancing religion nor does it entangle government with religion. Plaintiffs do not show a fair chance of success on the merits for this claim.

IV. CONCLUSION

The court finds that the statute in question was enacted with the primary purpose of ameliorating the adverse secondary effects of sexually oriented businesses. As such, the statute passes muster under the intermediate scrutiny standard of review. The court finds that Plaintiffs are unable to meet the requirement of showing a fair chance of success on the merits. Therefore,

IT IS ORDERED that Plaintiffs' application for preliminary injunction is **DENIED**. (Dkt. 2 in 1998 CV-1583) (Dkt. 2 in 1998 CV-1584)

DATED this 30 day of September, 1999.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; DREAM PALACE, a dba of Liberty Entertainment Group, L.L.C., an Arizona Limited Liability Company; CASTLE SUPERSTORE CORPORATION, an Arizona corporation,

Plaintiffs-Appellants,

and

L.J. CONCEPTS, INC.,

Plaintiff,

v.

MARICOPA COUNTY, Arizona; RICHARD M. ROMLEY, in his official capacity as Maricopa County Attorney; CITY OF PHOENIX, a municipal corporation;,

Defendants-Appellees,

STATE OF ARIZONA,

Intervenor-Appellee,

and

CITY OF GLENDALE,

Defendant.

No. 00-16858

D.C. No. CV-98-01584-EHC District of Arizona, Phoenix

ORDER

(Filed Sep. 30, 2003)

LJ CONCEPTS, INC., an Arizona corporation; STUMMER LLC, INC., an Arizona corporation; MID-CITY ENTERPRISES, INC., an Arizona corporation; B.C. BOOKS, INC., a Delaware corporation; MICHAEL J. AHEARN;,

Plaintiffs-Appellants,

STATE OF ARIZONA; STATE OF ARIZONA,

Intervenors-Appellees,

and

CENTER FOR FAIR PUBLIC POLICY, an Arizona non-profit corporation; DREAM PALACE an Arizona Limited Liability Company dba Liberty Entertainment Group, L.L.C.; CASTLE SUPERSTORE CORPORATION, an Arizona corporation; DANIEL RAY GOLLADAY,

Plaintiffs,

v.

CITY OF PHOENIX, a municipal corporation; MARICOPA COUNTY, Arizona; RICHARD ROMLEY, in his official capacity as Maricopa County Attorney; CITY OF PHOENIX, a municipal corporation; CITY OF GLENDALE, an Arizona municipal corporation,

Defendants-Appellees.

No. 00-16905

D.C. Nos.
CV-98-01583-EHC
CV-98-01584-EHC

District of Arizona,
Phoenix

Before: CANBY, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

A majority of the panel has voted to deny plaintiffs-appellants' petition for rehearing and suggestion for rehearing en banc. Judges O'Scannlain and W. Fletcher voted to deny the petition for rehearing and the suggestion for rehearing en banc. Judge Canby voted to grant the petition for rehearing and recommended granting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing and suggestion for rehearing en banc are therefore DENIED.

APPENDIX H

Conference Engrossed

State of Arizona
Senate
Forty-third Legislature
Second Regular Session
1998

SENATE BILL 1162

AN ACT

AMENDING SECTIONS 4-112 AND 11-821. ARIZONA REVISED STATUTES; AMENDING TITLE 11, CHAPTER 6, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 11-821-.02; AMENDING TITLE 13, CHAPTER 14, ARIZONA REVISED STATUTES, BY ADDING SECTION 13-1421; RELATING TO ADULT ORIENTED BUSINESSES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 4-112, Arizona Revised Statutes, is amended to read:

4-112. *Powers and duties of board and director of department of liquor licenses and control; investigations; county and municipal regulation*

A. The board shall:

1. Grant and deny applications in accordance with the provisions of this title.

2. Adopt rules in order to carry out the provisions of this section.

3. Hear appeals and hold hearings as provided in this section.

B. Except as provided in subsection A of this section, the director shall administer the provisions of this title, including:

1. Adopting rules:

(a) For carrying out the provisions of this title.

(b) For the proper conduct of the business to be carried on under each specific type of spirituous liquor license.

(c) To enable and assist state officials and political subdivisions to collect taxes levied or imposed in connection with spirituous liquors.

(d) For the issuance and revocation of certificates of registration of retail agents, including provisions governing the shipping, storage and delivery of spirituous liquors by registered retail agents, the keeping of records and the filing of reports by registered retail agents.

(e) To establish requirements for licensees under section 4-209, subsection B, paragraph 12.

2. Employing necessary personnel and fixing their compensation.

3. Keeping an index record which shall be a public record open to public inspection and shall contain the name and address of each licensee and the name and address of any person having an interest, either legal or

equitable, in such license as shown by any written document, which document shall be placed on file in the office of the board.

4. Providing the board with such supplies and personnel as may be directed by the board.

5. Responding in writing to any law enforcement agency that submits an investigative report to the department relating to a violation of this title, setting forth what action, if any, the department has taken or intends to take on the report and, if the report lacks sufficient information or is otherwise defective for use by the department, what the agency must do to remedy the report.

6. Taking such steps as are necessary to maintain effective liaison with the department of public safety and all local law enforcement agencies in the enforcement of this title including the laws of this state against the consumption of spirituous liquor by persons under the legal drinking age.

7. Providing training to law enforcement agencies in the proper investigation and reporting of violations of this title.

C. The director shall establish within the department a separate investigations unit which has as its sole responsibility the investigation of compliance with this title including the investigation of licensees alleged to have sold or distributed spirituous liquor in any form to persons under the legal drinking age.

D. All employees of the department of liquor licenses and control, except members of the state liquor board and the director of the department, shall be employed by the

department in the manner prescribed by the department of administration.

E. The director may enter into a contract or agreement with any public agency for any joint or cooperative action as provided for by title 11, chapter 7, article 3.

F. The board or the director may take evidence, administer oaths or affirmations issue subpoenas requiring attendance and testimony of witnesses, cause depositions to be taken and require by subpoena duces tecum the production of books, papers and other documents which are necessary for the enforcement of this title. Proceedings held during the course of a confidential investigation are exempt from title 38, chapter 3, article 3.1. If a person refuses to obey a subpoena or fails to answer questions as provided by this subsection, the board or the director may apply to the superior court in the manner provided in section 12-2212. The board or director may serve subpoenas by personal service or certified mail, return receipt requested.

G. The director may:

1. Examine books, records and papers of a licensee.

2. Require applicants, licensees, employees who serve, sell or furnish spirituous liquors to retail customers, managers and managing agents to take training courses approved by the director in spirituous liquor handling and spirituous liquor laws and rules. The director shall adopt rules that set standards for approving training courses.

3. Delegate to employees of the department authority to exercise powers of the director in order to administer the department.

4. Regulate signs that advertise a spirituous liquor product at licensed retail premises.

5. Cause to be removed from the marketplace spirituous liquor that may be contaminated.

6. Regulate the age and conduct of erotic entertainers at licensed premises. The age limitation governing these erotic entertainers may be different from other employees of the licensee.

7. Issue and enforce cease and desist orders against any person or entity that sells beer, wine or spirituous liquor without an appropriate license or permit.

8. Confiscate wines carrying a label including a reference to Arizona or any Arizona city, town or place unless at least seventy-five per cent by volume of the grapes used in making the wine were grown in this state.

H. A COUNTY OR municipality may enact and enforce ordinances regulating the age and conduct of erotic entertainers at licensed premises in a manner at least as restrictive as rules adopted by the director.

Sec. 2. Section 11-821, Arizona Revised Statutes, is amended to read:

11-821. *County plan; definitions*

A. The commission shall formulate and adopt a comprehensive long-term county plan for the development of the area of jurisdiction. The county plan, with the accompanying maps, plats, charts and descriptive matter, shall show the commission's recommendations for the development of the area of jurisdiction together with the general zoning regulations. The county plan shall be made with the general purpose of guiding and accomplishing a

coordinated, adjusted and harmonious development of the area of jurisdiction. In the preparation of the county plan the commission shall make surveys and studies of the present conditions and prospective future growth of the area of the jurisdiction.

B. The county plan shall provide for zoning, shall show the zoning districts designated as appropriate for various classes of residential, business and industrial uses and shall provide for the establishment of setback lines and other plans providing for adequate light, air and parking facilities, and for expediting traffic within the districts. The plan may establish the percentage of a lot or parcel which may be covered by buildings, and the size of yards, courts and other open spaces. The plan shall consider access to incident solar energy. The plan may provide for retirement community zoning districts. The plan may provide for the REGULATION AND use of business licenses, ADULT ORIENTED BUSINESS MANAGER PERMITS AND ADULT SERVICE PROVIDER PERMITS in conjunction with the establishment OR OPERATION of adult oriented BUSINESSES AND facilities, including adult arcades, adult bookstores or video stores, CABARETS, adult live entertainment establishments, adult motion picture theaters, adult theaters, massage establishments and nude model studios. WITH RESPECT TO CABARETS, THE PLAN SHALL NOT CONFLICT WITH SPECIFIC STATUTORY OR VALID REGULATORY REQUIREMENTS APPLICABLE TO PERSONS LICENSED TO DISPENSE ALCOHOLIC BEVERAGES, BUT THE PLAN MAY INCLUDE REGULATION OF THE AGE AND CONDUCT OF EROTIC ENTERTAINERS IN A MANNER AT LEAST AS RESTRICTIVE AS RULES ADOPTED UNDER TITLE 4.

C. To carry out the purposes of this article, the board may adopt overlay zoning districts and regulations applicable to particular buildings, structures and land within individual zones. For the purposes of this subsection, "overlay zoning district" means a special zoning district that includes regulations which modify regulations in another zoning district with which the overlay zoning district is combined. Overlay zoning districts and regulations shall be adopted pursuant to section 11-829. The provisions of overlay zoning shall apply retroactively to authorize overlay zoning districts and regulations adopted before April 20, 1993.

D. For the purposes of this section:

1. "Adult arcade" means any place to which the public is permitted or invited and in which coin-operated or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image producing devices are maintained to show images involving specific sexual activities or specific anatomical areas to persons in booths or viewing rooms.

2. "Adult bookstore or video store" means a commercial establishment that offers for sale or rent any of the following as one of its principal business purposes:

(a) Books, magazines, periodicals or other printed matter, photographs, films, motion pictures, videocassettes or reproductions or slides or other visual representations that depict or describe specific sexual activities or specific anatomical areas.

(b) Instruments, devices or paraphernalia that are designed for use in connection with specific sexual activities.

3. "Adult live entertainment establishment" means an establishment that features either:

(a) Persons who appear in a state of nudity.

(b) Live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

4. "Adult motion picture theater" means a commercial establishment in which for any form of consideration films, motion pictures, videocassettes, slides or other similar photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas are predominantly shown.

5. "ADULT ORIENTED BUSINESS" MEANS ADULT ARCADES, ADULT BOOK STORES OR ADULT VIDEO STORES, CABARETS, ADULT LIVE ENTERTAINMENT ESTABLISHMENTS, ADULT MOTION PICTURE THEATERS, ADULT THEATERS, MASSAGE ESTABLISHMENTS THAT OFFER ADULT SERVICE OR NUDE MODEL STUDIOS.

6. "ADULT ORIENTED BUSINESS MANAGER" MEANS A PERSON ON THE PREMISES OF AN ADULT ORIENTED BUSINESS WHO IS AUTHORIZED TO EXERCISE OVERALL OPERATIONAL CONTROL OF THE BUSINESS.

7. "ADULT SERVICE" MEANS DANCING, SERVING FOOD OR BEVERAGES, MODELING, POSING, WRESTLING, SINGING, READING, TALKING, LISTENING OR OTHER PERFORMANCES OR ACTIVITIES CONDUCTED FOR ANY CONSIDERATION IN AN ADULT ORIENTED BUSINESS BY A PERSON WHO IS NUDE OR SEMINUDE DURING ALL OR PART OF THE

TIME THAT THE PERSON IS PROVIDING THE SERVICE.

8. "ADULT SERVICE PROVIDER" OR "EROTIC ENTERTAINER" MEANS ANY NATURAL PERSON WHO PROVIDES AN ADULT SERVICE.

~~5.~~ 9. "Adult theater" means a theater, concert hall, auditorium or similar commercial establishment that predominantly features persons who appear in a state of nudity or who engage in live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

10. "CABARET" MEANS AN ADULT ORIENTED BUSINESS LICENSED TO PROVIDE ALCOHOLIC BEVERAGES PURSUANT TO TITLE 4, CHAPTER 2, ARTICLE 1.

11. "DISCERNIBLY TURGID STATE" MEANS THE STATE OF BEING VISIBLY SWOLLEN, BLOATED, INFLATED OR DISTENDED.

~~6.~~ 12. "Massage establishment" means an establishment in which a person, firm, association or corporation engages in or permits massage activities, including any method of pressure on, friction against, stroking, kneading, rubbing, tapping, pounding, vibrating or stimulating of external soft parts of the body with the hands or with the aid of any mechanical apparatus or electrical apparatus or appliance. This paragraph does not apply to:

(a) Physicians licensed pursuant to title 32, chapter [sic] 7, 8, 13, 14 or 17.

(b) Registered nurses, licensed practical nurses or technicians who are acting under the supervision of a physician licensed pursuant to title 32, chapter 13 or 17.

(c) Persons who are employed or acting as ~~trainees~~ TRAINERS for a bona fide amateur, semiprofessional or professional athlete or athletic team.

(d) Persons who are licensed pursuant to title 32, chapter 3 or 5 if the activity is limited to the head, face or neck.

~~7.~~ 13. "Nude model studio" means a place in which a person who appears in a state of nudity or who displays specific anatomical areas is observed, sketched, drawn, painted, sculptured, photographed or otherwise depicted by other persons who pay money or other consideration. Nude model studio does not include a proprietary school that is licensed by this state, a college, community college or university that is supported entirely or in part by taxation, a private college or university that maintains and operates educational programs in which credits are transferable to a college, community college or university that is supported entirely or in part by taxation or a structure to which the following apply:

(a) A sign is not visible from the exterior of the structure and no other advertising appears indicating that a nude person is available for viewing.

(b) A student must enroll at least three days in advance of a class in order to participate.

(c) No more than one nude or seminude model is on the premises at any time.

~~8.~~ 14. "NUDE", "nudity" or "state of nudity" means ANY OF THE FOLLOWING:

(a) The appearance of a human anus, genitals or female breast BELOW A POINT IMMEDIATELY ABOVE THE TOP OF THE AREOLA.

(b) A state of dress that fails to opaquely cover a human anus, genitals or ~~areola of the~~ female breast BELOW A POINT IMMEDIATELY ABOVE THE TOP OF THE AREOLA.

15. "PRINCIPAL BUSINESS PURPOSES" MEANS THAT A COMMERCIAL ESTABLISHMENT DERIVES FIFTY PER CENT OR MORE OF ITS GROSS INCOME FROM THE SALE OR RENTAL OF ITEMS LISTED IN PARAGRAPH 2.

~~9.~~ 16. "Seminude" means a state of dress in which clothing covers no more than the genitals, pubic region and ~~areola of the~~ female breast BELOW A POINT IMMEDIATELY ABOVE THE TOP OF THE AREOLA, as well as portions of the body that are covered by supporting straps or devices.

~~10.~~ 17. "Specific anatomical areas" means ANY OF THE FOLLOWING: ~~the male genitals in a state of sexual arousal or the vulva or more intimate parts of the female genitals. Specific anatomical areas may include:~~

(a) ~~Human~~ A HUMAN ANUS, genitals, pubic region or A FEMALE breast below a point immediately above the top of the areola that is less than completely and opaquely covered.

(b) Male genitals in a discernibly turgid state even if completely and opaquely covered.

~~11.~~ 18. "Specific sexual activities" means any of the following:

(a) Human genitals in a state of sexual stimulation or arousal.

(b) Sex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy.

(c) Fondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast.

(d) Excretory functions as part of or in connection with any of the activities under subdivision (a), (b) or (c) of this paragraph.

Sec. 3. Title 11, chapter 6, article 2, Arizona Revised Statutes, is amended by adding section 11-821.02, to read:

11-821.02. *Operating requirements for businesses and facilities*

NOTWITHSTANDING SECTION 11-830, A COUNTY IN REGULATING OR LICENSING BUSINESSES AND FACILITIES PURSUANT TO SECTION 11-821, MAY IMPOSE REASONABLE OPERATING REQUIREMENTS THAT AFFECT THE EXISTING USES OF BUSINESSES AND FACILITIES.

Sec. 4. Title 13, chapter 14, Arizona Revised Statutes, is amended by adding section 13-1421, to read:

13-1421. *Sexually oriented businesses: hours of operation: classification: definitions*

A. AN ADULT ARCADE, ADULT BOOKSTORE OR VIDEO STORE, ADULT CABARET, ADULT MOTION

PICTURE THEATER, ADULT THEATER, ESCORT AGENCY OR NUDE MODEL STUDIO SHALL NOT REMAIN OPEN AT ANY TIME BETWEEN THE HOURS OF 1:00 A.M. AND 8:00 A.M. ON MONDAY THROUGH SATURDAY AND BETWEEN THE HOURS OF 1:00 A.M. AND 12:00 NOON ON SUNDAY.

B. A VIOLATION OF THIS SECTION IS A CLASS 1 MISDEMEANOR.

C. THIS SECTION DOES NOT PROHIBIT COUNTIES OR MUNICIPALITIES FROM ENACTING AND ENFORCING ORDINANCES THAT REGULATE SEXUALLY ORIENTED BUSINESSES IN A MANNER THAT IS AT LEAST AS RESTRICTIVE AS SUBSECTION A OF THIS SECTION.

D. FOR THE PURPOSES OF THIS SECTION:

1. "ADULT ARCADE" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

2. "ADULT BOOKSTORE OR VIDEO STORE" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

3. "ADULT CABARET" EXCLUDES ANY ESTABLISHMENT LICENSED UNDER TITLE 4 AND INCLUDES ANY NIGHTCLUB, BAR, RESTAURANT OR OTHER SIMILAR COMMERCIAL ESTABLISHMENT THAT REGULARLY FEATURES:

(a) PERSONS WHO APPEAR IN A STATE OF NUDITY OR WHO ARE SEMINUDE.

(b) LIVE PERFORMANCES THAT ARE CHARACTERIZED BY THE EXPOSURE OF SPECIFIC ANATOMICAL AREAS OR SPECIFIC SEXUAL ACTIVITIES.

(c) FILMS, MOTION PICTURES, VIDEOCASSETTES, SLIDES OR OTHER PHOTOGRAPHIC REPRODUCTIONS THAT ARE CHARACTERIZED BY THE DEPICTION OR DESCRIPTION OF SPECIFIC SEXUAL ACTIVITIES OR SPECIFIC ANATOMICAL AREAS.

4. "ADULT MOTION PICTURE THEATER" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

5. "ADULT THEATER" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

6. "ESCORT" MEANS A PERSON WHO FOR CONSIDERATION AGREES OR OFFERS TO ACT AS A COMPANION, GUIDE OR DATE FOR ANOTHER PERSON OR WHO AGREES OR OFFERS TO PRIVATELY MODEL LINGERIE OR TO PRIVATELY PERFORM A STRIPTEASE FOR ANOTHER PERSON.

7. "ESCORT AGENCY" MEANS A PERSON OR BUSINESS ASSOCIATION THAT FURNISHES, OFFERS TO FURNISH OR ADVERTISES THE FURNISHING OF ESCORTS AS ONE OF ITS PRIMARY BUSINESS PURPOSES FOR ANY FEE, TIP OR OTHER CONSIDERATION.

8. "NUDE MODEL STUDIO" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

9. "NUDE", "NUDITY" OR "STATE OF NUDITY" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

10. "SEMINUDE" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

11. "SPECIFIC ANATOMICAL AREAS" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

12. "SPECIFIC SEXUAL ACTIVITIES" HAS THE SAME MEANING PRESCRIBED IN SECTION 11-821.

Sec. 5. *Emergency*

This act is an emergency measure that is necessary to preserve the public peace, health or safety and is operative immediately as provided by law.

(2)

No. 03-1107

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CENTER FOR FAIR PUBLIC POLICY, et al.,

Petitioners,

vs.

MARICOPA COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The petitioners' statement of issues is misleading because it is premised on an inaccurate assessment of the Ninth Circuit's Opinion. The real issue is whether the Ninth Circuit was correct in agreeing with the unanimous Opinions from other Circuits that limited hours-of-operation restrictions on sexually-oriented businesses are constitutional under this Court's "secondary effects" doctrine in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

PARTIES TO THE NINTH CIRCUIT APPEAL

The Ninth Circuit appeal was actually two consolidated appeals. The petitioners in this Court were plaintiffs/appellants in one of them (No. 00-16858). They are an Arizona non-profit corporation named Center for Fair Public Policy and an Arizona limited-liability company named Liberty Entertainment Group (dba Dream Palace).

There were seven plaintiffs/appellants in the other consolidated appeal (No. 00-16905). Five of them were Arizona corporations named Castle Superstore, L.J. Concepts, Stummer, L.L.C., Mid-City Enterprises and B.C. Books. The other two were individuals named Daniel R. Golladay and Michael J. Ahearn. None of these seven plaintiffs/appellants is seeking certiorari, and none of them is participating in the Supreme Court proceedings.

There were five defendants/appellees in the two consolidated appeals. They were all Arizona governmental entities: the State of Arizona, the City of Phoenix, the City of Glendale, Maricopa County and Richard M. Romley, in his capacity as Maricopa County Attorney. All of the defendants/appellees except the State of Arizona join in this Brief in Opposition. They do not know whether the State of Arizona will be filing a separate Brief in Opposition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE NINTH CIRCUIT APPEAL	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
DECISIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	10
1. The Ninth Circuit's Opinion Is In Agreement With The Other Circuits In Upholding The Constitutionality Of Hours-Of-Operation Regulations For Sexually-Oriented Businesses	10
2. The Ninth Circuit's Opinion Does Not Conflict With Justice Kennedy's Statement About Proportionality	10
3. There Is No Conflict Among The Circuit Courts Regarding The Application Of *Alameda Books*	12
4. The Ninth Circuit Applied The Correct "Narrow Tailoring" Test	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Boos v. Barry, 485 U.S. 312 (1988) 14

Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003) 2

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) ..... *passim*

DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999) 10

Encore Videos, Inc. v. City of San Antonio, 330 F. 3d 288 (5th Cir. 2003) 12

G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003) 12, 13

Lady J. Lingerie v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1998) 10

Mitchell v. Commission on Adult Entertainment, 10 F.3d 123 (3rd Cir. 1993) 4, 10

N.W. Enterprises, Inc. v. City of Houston, 352 F.3d 162 (5th Cir. 2003) 12

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731 (1st Cir. 1995) 10

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ..... *passim*

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998) 4, 10

Star Satellite v. City of Biloxi, 779 F.2d 1074 (5th Cir. 1986) 10

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994) 14

TABLE OF AUTHORITIES – Continued

Page

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6, 13, 14

Young v. American Mini Theatres, Inc., 475 U.S. 50 (1976) 15

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 2

A.R.S. § 13-1422 ..... *passim*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Maricopa County, the City of Phoenix, the City of Glendale and Richard M. Romley oppose petitioners' request for a Writ of Certiorari to review the July 28, 2003, Opinion of the Ninth Circuit. The Opinion is correct, well-reasoned and entirely consistent with this Court's precedents and every other Circuit that has decided the same issue. The petition has no merit and should be denied.

DECISIONS BELOW

A.R.S. § 13-1422 regulates the hours-of-operation for sexually-oriented businesses in Arizona. Plaintiffs in both of the consolidated cases challenged the constitutionality of that statute under the First Amendment.

The United States District Court for the District of Arizona denied plaintiffs' request for a preliminary injunction in an Order filed on September 30, 1999. (Record 57; Petitioners' App. 52) Plaintiffs appealed that Order to the Ninth Circuit, and the Ninth Circuit affirmed in a Memorandum Decision submitted on March 20, 2000. (Record 78; Petitioners' App. 50)

The parties then stipulated that the District Court's denial of the preliminary injunction could be treated as a denial of plaintiffs' request for a permanent injunction and a denial of plaintiffs' request for declaratory relief. (Record 83; Petitioners' App. 46) The District Court accepted that stipulation and entered Final Judgment in favor of the

governmental entities on September 13, 2000. (Record 84-85; Petitioners' App. 42-43)

Plaintiffs appealed again to the Ninth Circuit. That Court affirmed and upheld the constitutionality of A.R.S. § 13-1422 in a published Opinion issued on July 28, 2003. The cite for the Opinion is *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). (Petitioners' App. 1)

JURISDICTION

This Court has jurisdiction to consider the petition under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

A.R.S. § 13-1422 provides in relevant part as follows:

> A. An adult arcade, adult bookstore or video store, adult cabaret, adult motion picture theatre, adult theatre, escort agency or nude model studio shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday.
>
> B. A violation of this section is a class one misdemeanor.

Petitioners allege this Arizona statute violates the free-speech provision in the First Amendment to the United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

STATEMENT OF THE CASE

A.R.S. § 13-1422 was presented to 1998 Arizona Legislature as Senate Bill 1367 (later changed to Senate Bill 1162). The statute does not ban any type of sexually-oriented business or conduct. It only restricts sexually-oriented businesses from operating during late night hours.

The purpose of the statute was to combat the negative secondary effects that are generated by sexually-oriented businesses. These effects include decreased property values and increased crime, prostitution, public indecency and health risks associated with sexually-transmitted diseases.

The Arizona Legislature held public hearings in both the Senate and the House of Representatives. Numerous witnesses confirmed the negative secondary effects and their impact on Arizona communities. Some of the witnesses were local business people, and one was the co-founder of a neighborhood activist group. A legislative liaison for the City of Phoenix testified that state-level regulation was necessary due to limited local authority.

The Executive Director and General Counsel to the National Family Legal Foundation testified that similar hours-of-operation statutes had been upheld as constitutional by Circuit Courts of Appeal. He also testified that approximately 15 studies from around the country had documented the negative secondary effects generated by sexually-oriented businesses.

This same witness gave legislators a written memorandum and an e-mail discussing A.R.S. § 13-1422. Those documents discussed the studies that confirmed negative secondary effects, and they also repeated the constitutional findings of both the Third and Sixth Circuits. *See*, *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993).

Every legislator also received a letter and "fact sheet" from a community organization known as The Center for Arizona Policy. Those documents discussed A.R.S. § 13-1422 and detailed the findings of the various studies on negative secondary effects. The fact sheet emphasized that those effects could be reduced by limiting hours of operation for sexually-oriented businesses, and it amplified that that was the purpose of A.R.S. § 13-1422.

Petitioners and the other plaintiffs are owners and operators of sexually-oriented businesses in Arizona. They include nude-dancer clubs, X-rated video arcades and sellers of sexually-related magazines and paraphernalia. Most of the businesses were open 24-hours a day prior to the enactment of A.R.S. § 13-1422.

The hours-of-operation statute became effective on August 21, 1998. Petitioners and the other plaintiffs filed these consolidated lawsuits about a week later. Respondents were named as defendants because they are governmental entities charged with enforcement of the statute. Petitioners sought preliminary and permanent injunctions, and they also sought a declaration that A.R.S. § 13-1422 violates the First Amendment.

The District Court recognized that these cases were controlled by *Renton v. Playtime Theatres, Inc.*, 475 U.S.

41 (1986). *Renton* was the case where this Court established the now-familiar three-part test for evaluating the constitutionality of sexually-oriented business regulations:

- Does the regulation ban speech, or does it merely regulate the time, place or manner of speech?
- Is the purpose of the regulation to suppress sexual speech, or is the purpose instead to combat negative secondary effects that are generated by sexually-oriented businesses?
- Is the regulation designed to serve a substantial government interest, and does it leave open reasonable alternative avenues of communication?

475 U.S. at 46-50.

Renton also explained that governments are entitled to rely on evidence of the experiences and studies conducted by other jurisdictions, as well as the findings and statements contained in judicial Opinions. Time, place and manner regulations should be upheld "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

The District Court decided that A.R.S. § 13-1422 is constitutional under *Renton*. The Arizona statute obviously is a time regulation, and it makes no attempt to ban any sexual speech. The District Court explained that the Legislature's purpose was "to ameliorate the harmful secondary effects commonly associated with adult businesses." (Record 57 at 7; Petitioners' App. 57)

The District Court then said the record showed ample evidence, both oral and written, to support the legislative purpose. The District Court explained that while the legislative record was not extensive, it did contain testimony, fact sheets and letters regarding studies and cases from other jurisdictions that sufficiently illustrated a logical relationship between the hours-of-operation statute and the intent to combat the negative secondary effects of sexually-oriented businesses. (Record 57 at 8-10; Petitioners' App. 58-59)

The District Court next pointed out that *Renton* had already settled that combating secondary effects is a significant government interest. It said the statute was narrowly tailored under *Renton* because it would combat secondary effects more effectively than no statute at all, but still was not "substantially broader than necessary." See, *Ward v. Rock Against Racism*, 491 U.S 781 (1989). (Record 57 at 12-13; Petitioners' App. 60-61)

The District Court concluded its *Renton* analysis by emphasizing that petitioners and the other plaintiffs had ample alternative avenues of communication. Their businesses may remain open 17 hours a day Monday through Saturday, and 13 hours on Sunday. This totals more than 5900 hours per year that sexually-oriented businesses may be open in Arizona. (Record 57 at 13-14; Petitioners' App. 61-62)

While the consolidated cases were pending in the Ninth Circuit, this Court rendered its Opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). That case involved a Los Angeles zoning ordinance that prohibits more than one type of sexually-oriented business from operating in the same building. Two businesses that

combined video arcades and retail sales challenged the ordinance on First Amendment grounds.

The issue in *Alameda Books* was whether Los Angeles could constitutionally rely on only one distinguishable study regarding negative secondary effects. The Ninth Circuit said the study was inadequate to show a "substantial government interest" under *Renton*, but this Court reversed in a 5-4 decision. Justice O'Connor wrote the plurality Opinion, with Justices Scalia, Thomas and the Chief Justice joining. Justice Kennedy concurred separately.

The plurality reaffirmed *Renton* and the idea that regulations aimed at negative secondary effects will be upheld if their legislative purpose is to serve a substantial government interest. It also criticized the Ninth Circuit for conducting an independent assessment of the secondary-effects study that Los Angeles had relied on. The plurality said the Ninth Circuit was wrong to substitute its assessment of the study for that of the city, but it also cautioned:

> That is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual finding, the municipality meets the standard set forth in *Renton*.

535 U.S. at 438-439.

Justice Kennedy agreed with the plurality about *Renton*. He said "the central holding of *Renton* is sound,"

and the government's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. 535 U.S. at 444 and 448.

Justice Kennedy nevertheless did not want to expand *Renton* any further. He said that suppression of secondary effects may be accomplished by reference to protected speech, but "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." The plurality found this statement "unobjectionable" because it was:

> . . . simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban.

The plurality then emphasized that the Ninth Circuit had already determined that the Los Angeles ordinance did not ban any speech. 535 U.S. at 442 and 449.

Petitioners here told the Ninth Circuit that *Alameda Books* constitutes a "sea change" in First Amendment law. They suggested the *Renton* framework no longer applies to time, place and manner cases, and that Courts must apply strict scrutiny whenever they measure the constitutionality of sexually-oriented-business regulations.

The Ninth Circuit disagreed. The majority pointed out that five Justices in *Alameda Books* (including Justice Kennedy) had reaffirmed *Renton*. The majority also said that Justice Kennedy's statement about proportionality does not apply here because A.R.S. § 13-1422 does not suppress any speech. It only limits the hours of operation for sexually-oriented businesses. 336 F.3d at 1162-1164.

The Ninth Circuit then performed essentially the same *Renton* analysis as the District Court. The majority explained the critical issue was whether respondents met their burden of demonstrating a connection between the hours regulation and the secondary effects that motivated adoption of the statute. In holding that respondents did meet that burden, the majority recognized:

> All of the evidence the Arizona legislature considered fairly supports its rationale that prohibiting sexually oriented businesses from operating in the late night hours will lead to a reduction in secondary effects, and generally enhance the quality of life for Arizona citizens.

336 F.3d at 1167.

The majority also decided that the statue is narrowly tailored. It said that amelioration of secondary effects would be achieved less effectively in absence of the statute, and:

> Testimonial evidence was introduced specific to the late night operation of such businesses, and the legislature was briefed on two studies specific to problems associated with nighttime operation of sexually oriented businesses.

336 F.3d at 1169. The Ninth Circuit therefore affirmed the Final Judgment of the District Court.

REASONS FOR DENYING THE WRIT

1. The Ninth Circuit's Opinion Is In Agreement With The Other Circuits In Upholding The Constitutionality Of Hours-Of-Operation Regulations For Sexually-Oriented Businesses.

Unlike the "hugely unique" zoning ordinance in *Alameda Books*, the statute involved here is a routine hours-of-operation regulation. Many (if not most) jurisdictions have identical or even more stringent hours restrictions.

No other Circuit has ever struck down an hours-of-operation restriction for sexually-oriented businesses. The same First Amendment issues raised here were previously decided by the First, Third, Fifth, Sixth, Seventh and Eleventh Circuits. Every one of those jurisdictions upheld the constitutionality of hours-of-operation statutes for sexually-oriented businesses. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1998); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

2. The Ninth Circuit's Opinion Does Not Conflict With Justice Kennedy's Statement About Proportionality.

Justice Kennedy said the government may not assert that it will reduce secondary effects by "reducing speech in the same proportion." Petitioners claim this created a

heightened proportionality requirement for all sexually-oriented-business cases, and the Ninth Circuit erred in concluding that Justice Kennedy did not intend "proportionality" to invalidate every time, place and manner regulation. Petitioners are wrong.

As the Ninth Circuit explained, there is a major difference between the zoning ordinance in *Alameda Books* and the hours-of-operation restriction here. The Los Angeles zoning ordinance prohibits more than one type of sexually-oriented business from operating in the same building. One of plaintiffs' main arguments in *Alameda Books* was that this "hugely unique" ordinance effectively banned video arcades because they are not financially viable as stand-alone operations.

Justice Kennedy was addressing this "effective banning" argument when he said governments cannot reduce secondary effects by simply eliminating some speech. The plurality understood this and said Justice Kennedy's idea was "unobjectionable" because proportionality only becomes an issue when there is a ban or elimination of some protected speech.

Nothing is banned (effectively or otherwise) by A.R.S. § 13-1422. The Arizona Legislature did not try to "zone" anyone out of business. The statute is a routine hours regulation, and petitioners and the other plaintiffs are still free to open their businesses for 5900 hours every year.

Under these circumstances, *Renton* remains controlling. Justice Kennedy agreed with the plurality that *Renton* is sound. He also agreed that the government must have latitude to experiment with solutions, and that "very little evidence is required" to justify a secondary-effects statute. 535 U.S. at 451.

The undisputed evidence here proved that A.R.S. § 13-1422 was aimed at secondary effects, not sexual speech. That is precisely what *Renton* and *Alameda Books* require, so there is no reason for this Court to get involved.

3. There Is No Conflict Among The Circuit Courts Regarding The Application of *Alameda Books*.

Petitioners next claim certiorari is warranted because there is "a significant conflict" in the Circuit Courts of Appeals regarding Justice Kennedy's statement about proportionality. This argument is groundless.

Petitioners cite three recent Opinions in support of their theory. *See, N.W. Enterprises, Inc. v. City of Houston*, 352 F.2d 162 (5th Cir. 2003); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); and *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). None of those cases expressed any difficulty in applying *Alameda Books*, and none of the Circuit Courts even mentioned the so-called "conflict" that petitioners claim to exist.

The three cases also are very different from this case and each other. *N.W. Enterprises* involved license and zoning amendments to a comprehensive regulatory scheme. *G.M. Enterprises* involved performance limitations on nude dancing. *Encore Videos* involved a separation ordinance that prohibits sexually-oriented businesses from locating within 1000 feet of residential areas.

Nevertheless, the Seventh Circuit and both panels of the Fifth Circuit had no difficulty recognizing that *Renton* still applies to time, place and manner regulations. They

all discussed *Alameda Books*, and none of them accepted petitioners' contention in this case that *Renton* is no longer good law. As the Seventh Circuit explained in *G.M. Enterprises*:

> Justice Kennedy agreed [in *Alameda Books*] that the *Renton* test provided the appropriate level of scrutiny for a regulation that is "targeted not at the activity, but at its side effects." *Alameda Books*, 535 U.S., at 447.

350 F.3d at 637.

The Ninth Circuit understood the same thing here. There is no conflict among the Circuits, and this Court should ignore petitioners' attempt to create one.

4. The Ninth Circuit Applied The Correct "Narrow Tailoring" Test.

Petitioners' final argument for certiorari is that the Ninth Circuit stopped short in applying the "narrow tailoring" requirement of *Renton*. For this argument, petitioners accept that curbing secondary effects is a substantial government interest. They also accept that this Court stated the test for narrow tailoring in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989):

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that

> would be achieved less effectively absent the regulation."

491 U.S. at 798-799.

The Ninth Circuit cited *Ward* and expressly applied that test here. 336 F.3d at 1169. Petitioners claim that was not enough because the majority failed to address *Ward's* caveat that the regulation still cannot "burden substantially more speech than is necessary to further the government's legitimate interests." 491 U.S. at 799.

Petitioners are wrong for three reasons. One is because *Renton* expressly held that narrow tailoring is satisfied if the regulation applies only to the category of businesses associated with the secondary effects. 475 U.S. at 52. That is true here, and this Court has previously emphasized the targeted secondary effects are "almost unique" to sexually-explicit businesses. *Boos v. Barry*, 485 U.S. 312 (1988).

Petitioners also are wrong because the Ninth Circuit considered tailoring in the context of alternative avenues of communication. The majority highlighted that petitioners' businesses could remain open 17 hours a day Monday through Saturday, and 13 hours on Sunday. The Ninth Circuit was mindful of a fair means-end fit, and it reasonably agreed with the District Court that leaving 5900 hours of open time each year does not "burden substantially more speech than is necessary" under *Ward*.

Finally, narrow tailoring is a deferential standard. Courts should not second-guess legislative bodies, and where the record validates the Legislature's judgment, Courts should refrain from "replacing [legislative] factual predictions with our own." *Turner Broadcasting System,*

Inc. v. F.C.C., 512 U.S. 622 (1994). *See also, Young v. American Mini Theatres, Inc.*, 475 U.S. 50 (1976) (legislatures "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.")

The Ninth Circuit has not suddenly become lenient on government regulations for sexually-oriented businesses. The Ninth Circuit simply followed this Court's precedents, and there is nothing in the Opinion to indicate that the majority:

> .... established a new and startling speech-insensitive test for "narrow tailoring" which eliminates all suggestion that such restrictions must be "narrow," "tailored," or in any way "efficacious."

Petition at 19. This Court should not be fooled by petitioners' hysterics.

CONCLUSION

A.R.S. § 13-1422 is a modest hours-of-operation regulation, narrowly tailored and specifically intended to reduce the negative secondary effects that are generated by sexually-oriented businesses. The Ninth Circuit's Opinion is consistent with every other Circuit that has addressed the same issue. It also is consistent with *Renton* and *Alameda Books*. The petition is groundless, and there is no reason for the Court to grant certiorari. Respondents therefore ask the Court to deny the petition in its entirety.

Respectfully submitted this 3rd day of March, 2004.

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In The

Supreme Court of the United States

CENTER FOR FAIR PUBLIC POLICY, *et al.*,

Petitioners,

vs.

MARICOPA COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), does Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), constitute the holding of the Court in that case?

2. Did the court of appeals err in holding that Justice Kennedy's *Alameda Books* "proportionality" requirement for content-*based* time, place and manner restrictions contained no different elements and was not more speech-protective than the *Alameda* plurality's construction of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)?

3. Did the court of appeals err in alternatively holding that Justice Kennedy, in *Alameda*, intended to create a unique "proportionality" test applicable only to content-based "*place*" restrictions of expression, but inapplicable to content-based "*time*" or "*manner*" restrictions?

4. Did the court of appeals misstate this Court's ruling in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by holding that the "narrow tailoring" requirement for "time, place and manner" restrictions is satisfied merely "so long as the government's asserted interest would be achieved less effectively absent the regulation," without *at least* the additional requirement from *Ward* that "the means chosen are not substantially broader than necessary to achieve the government's interest," thus adopting a new "narrow tailoring" test which is neither "narrow" nor "tailored," and which imposes no effective limits whatsoever on legislative power to restrict the operation of expressive businesses?

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Center For Fair Public Policy and Dream Palace (hereafter "petitioners") submit this Reply solely to bring to the Court's attention certain inaccuracies which appear in the Brief in Opposition filed herein.

(1) At p. 8 of the Brief in Opposition, respondents significantly misrepresented the position taken by petitioners in the Court of Appeals by stating:

> Petitioners here told the Ninth Circuit that *Alameda Books* constitutes a "sea change" in First Amendment law. They suggested the *Renton* framework no longer applies to time, place and manner cases, and that courts must apply strict scrutiny whenever they measure the constitutionality of sexually-oriented-business regulations.

This statement is inaccurate in multiple respects. First, neither before nor since this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), have petitioners ever stated or even suggested (either in this Court or the court of appeals) that all sexually oriented business regulations are subject to strict scrutiny. Indeed, it is petitioners' position that such cases are extremely rare, and, unlike the present case, occur only when there is either a *direct* restraint on expression, or an indirect restraint coupled with definitive proof of a content-based purpose or intent. Moreover, merely because restrictions aimed primarily at adult businesses are now recognized as "content-based" rather than "content-neutral," neither petitioners nor any member of this Court has suggested that, *ipso facto*, such restrictions are therefore subject to strict scrutiny.

Second, petitioners' briefing in the court of appeals *affirmatively stated* that they were not seeking review under strict scrutiny. Petitioners maintained that, under Justice Kennedy's concurrence in *Alameda*, such restrictions are subject only to a "heightened" standard of *intermediate* scrutiny. *See* p. 16 of the Supplemental Brief of Appellants Center For Fair Public Policy filed in the Court of Appeals on or about October 3, 2002, where petitioners made their position on this issue extremely clear:

> Though he [Justice Kennedy] did not impose a test of *strict* judicial scrutiny, he nonetheless imposed a *heightened* intermediate scrutiny requirement far more demanding than the traditional time, place and manner test. (All emphases in original.)

(2) At pp. 10-11 of the Brief in Opposition, respondents again mischaracterized the position taken by petitioners:

> Petitioners claim . . . the Ninth Circuit erred in concluding that Justice Kennedy did not intend "proportionality" to invalidate every time, place and manner regulation.

In essence, respondents state that petitioners' claim herein is that Justice Kennedy's proportionality test compels invalidation of every time, place and manner regulation. Petitioners have made no such claim, and nothing in the certiorari petition filed herein, nor any of the briefing filed below, supports such a distortion of petitioners' position. In fact, the certiorari petition is entirely inconsistent with such a position for at least two distinct reasons. First, petitioners have at all times maintained that Justice Kennedy's opinion articulates a new "proportionality" requirement that only applies to content-*based* time, place and manner restrictions. Accordingly, it would leave content-*neutral* time place and manner restrictions –

like that at issue in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) – wholly unaffected.

Second, the certiorari petition made clear that even if a case involved a content-*based* time, place or manner regulation and Justice Kennedy's proportionality requirement were applied, its mere application would by no means be outcome-determinative. *See, e.g., G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003), prominently discussed in the certiorari petition herein at p. 14 for the proposition that Justice Kennedy's proportionality test was fully and fairly applied, and the ordinances there challenged nonetheless easily satisfied its requirements.

(3) At p. 13 of the Brief in Opposition, respondents misstate petitioners' position with respect to this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), stating that it is "petitioners' contention in this case that *Renton* is no longer good law." That is most assuredly *not* petitioners' position. As Justice Kennedy himself made clear, once government demonstrates that a content-based time, place and manner restriction meets the requirements of Justice Kennedy's threshold "proportionality test," the traditional *Renton* test is then applied in making a final determination as to the validity of the challenged provision.

Respectfully submitted,

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